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In the

United States Court of Appeals

For the Seventh Circuit

No. 12053

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, LEE S. ANDALMAN, YETTA S. ANDALMAN and MAXWELL N. ANDALMAN, Co-partners doing business under the name of SURPLEX SALES, a Co-partnership,

Plaintiffs-Appellants,

vs.

UNION CARBIDE & CARBON CORP., a New York Corporation, Owners and Operators of Division thereof known as HAYNES STELLITE CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable Michael L. Igoe, District Judge.

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Appendix to Appellant's Brief

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IN THE UNITED STATES DISTRICT COURT

• • (Civil Action—No. 55 C 308) • •

2/24/55	Filed complt. & copy	(JS5)	$15.00
2/24/55	Iss. summons & copy—copy of complt. att.		rw
3-3-55	Filed summons retd served	$2.20	d
3-16-55	Filed appearance of defts and atty		H
3-24-55	Filed Stipulation		
3-24-55	On stip deft's time to answer or otherwise plead is extd 30 days from March 23, 1955—Igoe, J. Mld notcs 3-29-55		H
4-25-55	Filed Stipulation		
4-25-55	On stip order time for deft to plead is extd to and including May 27, 1955— Draft—Clerk (No motion slip) Mld ntcs 4-27-55		H
6-10-55	Filed Answer of Union Carbide and Carbon Corp.		(8)
6-10-55	Filed Stipulation		(1)
6-10-55	On stip ordered the time for deft to plead be and it is hereby extd to and including June 10, 1955 By the Clerk (no motion slip) Mld ntcs 6-15-55		c
7-14-55	Cause set for trial on Feb. 20, 1956—Igoe, J. Mld ntcs 7-18-55		H
2-6-56	Fld defendant's motion for sum. judgment & brief in support thereof		wek
2-6-56	Filed Notice and Aff. of mailing	(1)	H
2-9-56	Filed Stipulation		

2-9-56	Order approving stip extd time for filing of various pleadings, briefs, etc. Elmer Gertz given leave to enter his appearance as co-counsel for pltfs. Cause reset for trial on June 4, 1956—Draft—Igoe, J. Mld ntcs 2-14-56		H
2-10-56	Filed appearance of co-counsel for pltfs		H
3-5-56	Filed Stipulation		
3-5-56	Enter order on stip leave to file amendment to complt instanter; deft to plead thereto on or before Apr. 30, 1956—Draft—Barnes, J. Mld ntcs 3-8-56		H
3-5-56	Filed Amendment to Complaint	(12)	H
3-20-56	Filed Notice and Motion	(2) (3)	a
3-20-56	Order directing defendant to produce certain documents within 10 days. Draft (Igoe, J.) Mld ntcs 3-23-56	(3)	a
4-11-56	Filed Stipulation		
4-11-56	Order approving stip extding time for filing of pleadings herein. Cause contd to Sept. 21, 1956 for hearing on motions for summary judgment and for trial—Draft—Igoe, J. Mld ntcs 4-18-56		H
5-10-56	Filed Stipulation	(1)	a
5-10-56	On stipulation order time for defendant to file its answer to the amendment to the complaint is extended to May 11, 1956. Draft (1) Barnes, J. a Mld Ntcs 5-16-56		
5-10-56	Filed Answer of the Defendant, Union Carbide & Carbon Corp., to the amendment to the Complaint.— (7)		a

6-6-56	Fld stip. (1)	
6-6-56	In stip. defts time to file Response to Further Request for Admissions is extended to June 11, 1956. Igoe-J. Mld ntcs 6-8-56	
6-6-56	Fld Response to Further Request for Admissions (8)	
6-15-56	Filed Stipulation (1)	a
6-15-56	Plaintiffs time to file certain pleadings and briefs extended to July 30, 1956 Draft (1) Igoe, J. Mld Ntcs 6-19-56	a
7-31-56	Filed Stipulation (2) By Stipulation time for plaintiffs' filing summary judgment motions etc. is extended as per draft. (Draft) (2)—Sullivan. J. Mld. Ntcs. 8-1-56	E
8-2-56	Filed depositions of G. H. Shelton, R. W. Williams & C. J. Dalton	H
8-13-56	Filed Pltf's Motion for Summary Judgment and Notice	
8-13-56	Filed Pltf's Brief in support of Motion	wek
8-13-56	Filed Notice and requests for admissions (10)	
8-13-56	Filed Further Request for admissions & Notice (10)	H
9-7-56	Filed Notice (1)	E
9-7-56	Filed Motion (3)	E
9-7-56	Time continued to file answer brief extended to 10-10-56 and 10 days thereafter to file reply brief. Plaintiff given 5 days to file counter affidavits to the request for admissions	

	Plaintiffs motion for summary judgment set for hearing or resetting 9-13-56.—Perry, J. Mld. Ntcs. 9-10-56		E
9-11-56	Filed Pltff's Counter Affidavit	(4)	H
9-13-56	Filed notice	(2)	
9-13-56	On Plaintiff's motion cause reset for trial on Nov. 16, 1956 at 2:00 P.M.—Igoe, J. Mld. Ntcs. 9-17-56		E
9-13-56	Defendant given until Oct. 10, 1956 to file answers to all plaintiffs requests for admissions. Hearing on Motions of Pltff. and defendant for summary judgments reset for Nov. 16, 1956 at 2:00 P.M.—Igoe, J. Mld. Ntcs. 9-17-56		E
10-8-56	Filed Notice	(1)	1
10-8-56	Deft gv lv to fl instr its Amended Responses to Further Request for Admissions.—Igoe J. Draft (1) Mailed notices 10-10-56		
10-8-56	Filed Response to request for admissions & Affdvt.	(8, 1)	
10-8-56	Filed Amended responses to certain Further Requests for Admissions.	(1)	1
10-9-56	Filed Notice	(2)	E
10-9-56	Fld. Motion for Production of Documents	(2)	E
10-9-56	Order directing defendant to produce certain documents (Draft) (2)—Igoe, J. Mld. Ntcs. 10-11-56		E
10-10-56	Filed Brief of Deft in reply to brief of pltfs		

10-10-56	Filed Affidavit of Glen H. Shelton	jk
10-17-56	Filed Notice (2)	E
10-17-56	Plaintiff's time to file reply brief extended to Nov. 5, 1956.—(Draft) (1)—Igoe, J. Mld. Ntcs. 10-19-56	E
10-18-56	Fld 2 Notices (1)(1)	
10-18-56	Deft given leave to file instanter exhibits referred to in affidavit of Glen H. Sheton. Draft (1)	
10-18-56	Fld exhibits	
10-18-56	Deft given leave to fl instanter an amendment to ans. Draft (1) Igoe—J.	
10-18-56	Fld Amendment to Answer of Deft (4) Mld ntcs 10-19-56	t E
11-1-56	Filed Notice; Motion & Affidavit. (1) (1,2)	I
11-1-56	Defendants time to ans further request for admissions extended for 30 days. Draft Pltffs time to fl brf in re: motions for Summary Judgment extended 40 days herefrom and hrg. on said motions for Summary Judgmt reset for Jan. 25, 1957 at 2:00 P.M.—Igoe J. Mld Ntcs. 11-5-56	I
11-9-56	Fld Notice & Motion (1)(1)	
11-9-56	Enter order motion of Union Carbide for production & inspection of documents. Draft Sullivan—J (1) Mld ntcs 11-14-56	t
11-14-56	Filed Notice, & Affidavit of mailing. (1, 1)	

11-20-56	Filed Deposition of Maxwell N. Andalman	a
11-23-56	Fld subpoena duces tecum	t
11-27-56	Fld Notice & Motion (1)(1)	
11-27-56	Deft's motion to strike remarks from the deposition of Maxwell Andalman is set for hearing on Dec. 7, 1956 at 2:00 P.M.—Igoe, J. Mld ntcs 11-28-56	H
11-30-56	Filed Answers of Defendant to further request for admissions dated Oct. 19, 1956. (3)	a
12-7-56	Order striking certain remarks from the deposition of Maxwell N. Andalman. Draft (2) Igoe, J. Mld Ntcs 12-10-56	a
12-10-56	Filed Notice & Pltfs' further request for admissions	
12-10-56	Filed Notice	H
12-10-56	Filed Pltfs' reply to brf of deft filed in opp to pltfs' mo for summ. judg.	
12-10-56	Filed supp. aff. in support of pltfs' motion for summ. judg. etc.	jk
1-25-57	Both Plaintiffs and Defendants motions for summary judgment are argued and taken under advisement.—Igoe, J. Mld Ntcs 1-25-57	a
2-11-57	Pltffs motion for summary judgment overruled & denied. Defts motion for summary judgment allowed. Deft directed to submit proposed findings of fact, conclusions of law & judgment order in open court on Feb. 18, 1957. Igoe, J. Mld ntcs 2-11-57	

2-11-57 Fld memorandum of opinion (3) t

2-18-57 Fld Notice (1)

2-18-57 Deft given leave to file a supplemental exhibit inst. Draft (1)
Plaintiffs given two (2) weeks herefrom to file objections to defts proposed findings of fact, conclusions of law & judgment order or to file their proposed findings of fact, conclusions of law and judgment order. Deft given three (3) days thereafter to reply thereto. Cause taken under advisement. Igoe, J.
Mld ntcs 2-20-57

2-18-57 Fld Exhibit t

3-4-57 Filed Notice (1) E

3-4-57 Filed Objections of Pltffs to findings of fact and conclusions of law and judgment order submitted by defendant (8) E

3-1-57 Clerk's file copy of transcript of proceedings had before Judge Igoe on Jan. 25, 1957, filed by Official Court Reporter, (pages 1 thru 59) I

3-1-57 Clerk's File copy of transcript of proceedings had before Judge Igoe on Sept. 13, 1956 filed by Official Court Reporter, (pages 1 thru 12) I

3-11-57 Filed Defendant's Reply Brief to Plaintiff's Objections to Defendants Suggested Findings of Fact and Conclusions of Law and Judgment. Co

3-26-57 Pltf's objections to deft's suggested Findings of Fact, Conclusions of Law & judgment order are overruled. Enter Findings of Fact, Conclusions of Law & Judgment Order denying pltf's motion for summary judgment and allowing deft's

motion for summary judgment. Enter Judgment in favor of deft finding deft not guilty as pltf's costs—Draft—Igoe, J. (JS6)
Mld ntcs 3-26-57 H

4-22-57 Filed Notice of Appeal of plaintiffs (1) 5.00 pd

4-22-57 Filed Cost Bond on Appeal (1)

4-22-57 Mailed copy of notice of Appeal to attys. for defendant B

]

PREFIX TO RECORD PURSUANT TO RULE 12(c) OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Time of commencement of suit: February 24, 1955.
Names of the original parties:

Plaintiffs: Rose Finsky, Avrum N. Andalman, Joseph M. Andalman, Lee B. Andalman, Yetta S. Andalman, and Maxwell N. Andalman, co-partners, doing business under the name of Surplex Sales, a co-partnership.

Defendant: Union Carbide & Carbon Corp., a New York Corporation, Owners and Operators of Division thereof known as Haynes Stellite Co.

2 No change in parties has taken place.
Pleadings:

(a) February 24, 1955—Plaintiffs' Complaint filed.
(b) June 10, 1955—Defendant's Answer filed.
(c) February 6, 1956—Defendant's motion for summary judgment and supporting affidavits filed.
(d) March 5, 1956—Plaintiffs' Amendment to Complaint filed.

(e) May 10, 1956—Defendant's Answer to Amendment to Complaint.

(f) August 13, 1956—Plaintiffs' motion for summary judgment and supporting documents in support thereof and in opposition to defendant's motion for summary judgment filed.

(g) October 10 and 18, 1956—Defendant's documents in opposition to plaintiffs' motion for summary judgment filed.

(h) October 18, 1956—Defendant's Amendment to Answer filed.

(i) December 10, 1956—Plaintiffs' documents in support of plaintiffs' motion for summary judgment and in opposition to defendant's motion filed.

Defendant was not arrested, or bail taken, or property attached. The case was argued on the respective motions for summary judgment before Judge Michael L. Igoe on January 25, 1957.

No question was referred to a commissioner, master or referee.

The case was not heard by a jury.

3 Judgment Order

(a) February 11, 1957—Plaintiffs' motion for summary judgment overruled; defendant's motion for summary judgment sustained; defendant directed to submit draft order. Court's Memorandum of Opinion filed.

(b) March 26, 1957—Judgment in favor of defendant entered.

Appeal Taken April 22, 1957.

Respectfully submitted,
Elmer Gertz and Irwin S. Baskes
Attorneys for Plaintiffs

Affidavit of mailing.

5

COMPLAINT AT LAW
and
COMPLAINT IN EQUITY

(Filed Feb. 24, 1955)

COUNT ~~I.~~

1. Now come the plaintiffs, Rose Finsky, Avrum N. Andalman, Joseph M. Andalman, Lee B. Andalman, Yetta S. Andalman, Maxwell N. Andalman, by their attorneys Irwin Baskes, and file this their complaint in law and give the court to understand and be informed that

2. The defendant, Union Carbide & Carbon Corporation, a New York corporation, owns and operates a division of its' business under the name of Haynes Stellite Company, with its' principal place of business in Kokomo, Indiana.

3. The plaintiffs herein above named are co-partners, operating a business under the co-partnership name of Surplex Sales in Chicago, County of Cook, Illinois, and that a diversity of citizenship exists between the plain-
6 tiffs, who live and reside in the city of Chicago, Cook County, State of Illinois, and the defendant, which is a New York corporation.

4. That more than $3,000.00 is involved in this law suit, and the amount which is involved in this litigation and the merchandise hereinafter referred to has a value far in excess of $3,000.00.

5. The plaintiffs further state that during the months of January and February, 1953 the defendant, through its said division, Haynes Stellite Co., wrote to the said Surplex Sales inviting the plaintiffs to competitive bid by sealed bids on certain merchandise as per its said letter, the original of which the plaintiffs are ready, willing, and

able to produce in open court, and a true correct copy of which is hereto attached and marked Plaintiffs' Exhibit No. "One", as all of which can be seen by a reference thereto being had.

6. That the said defendant published the fact that it was offering the said merchandise for bids in certain "trade publications", among which is "Waste Trade Journal", to which journal the plaintiffs are a subscriber; that the said request for bids appeared in the said publication on to wit: ~~13th day~~ of February, 1954; the 20th day of February, 1954; and the 6th day of February, 1954; that the said merchandise was offered and bids asked for same in accordance with the language appearing therein, a copy of which said publishings is attached hereto, shown as "Exhibit 2", as will by a reference thereto being had more fully appear.

7. Plaintiffs further state that within the time specified in the said letter and within the time specified in the said publishings, that is to say by to wit: 5 P.M. February 23, 1954, it submitted to the defendant the sealed bids of the plaintiffs for various items appearing in the said offerings as shown on the said plaintiffs' bid, a copy of which is attached hereto marked Plaintiffs' Exhibit No. "3", as will by reference thereto being had fully appear.

8. Plaintiffs further state that the defendant by and through its said division, Haynes Stellite Co., advised the plaintiffs on to wit: 6 P.M. 23rd day of February, 1954 that their bids were high on the following items:

10,268 lbs. lamp black	@ $.01022 lb.	$225.90
39 grinding wheels	@ 3.30	128.70
173,205 lbs. powdered tungsten, carbon reduced, 99% tungsten	1.304645 per lb.	225,971.10

and that the report would be made to the government and the plaintiffs would be notified orally and in writing if their bids were approved by the United States government.

9. Plaintiffs further state that on to wit: the 5th day of March, 1954 the government orally informed the plaintiffs that their high bid on the said items was approved and accepted.

10. Plaintiffs further state that on to wit: March 6, 1954, the said defendant, at its plant in Kokomo, Indiana, delivered to the plaintiffs one barrel of said tungsten powder weighing 438 pounds, and it received at the plaintiffs' hands the sum of $701.68 on account; that defendant then and there delivered to the plaintiffs in writing a communication as follows: to wit:

March 6, 1954

Surplex Sales
2409 So. LaSalle St.
Chicago, Illinois
Gentlemen:
This is to advise that you have been awarded approximately

173205 lbs. powdered tungsten, carbon reduced, 99% tungsten
10268 lbs. lamp black
40 grinding wheels

This award was granted in accordance with your bid of February 23, 1954.

Yours truly,
(signed) G. H. Shelton

and at the same time and place it was agreed that the plaintiffs would by, or on March 11, 1954, pay to the
8 defendant the additional sum of between $110,000 to $115,000.00, and receive at the hands of the defendant 1/3 of the tungsten powder purchased, and that the plain-

tiff would receive the balance of the said tungsten powder and of the said merchandise upon payment of the balance of approximately $116,000.00 within three weeks thereafter.

11. Plaintiffs further state that on to wit: the 10th day of March, 1954 the defendant notified the plaintiff that it would not deliver to the plaintiffs the said 173205 pounds of tungsten powder and gave as a sole and only reason therefor the fact that the U. S. government contracting officer had issued an order to the defendant suspending delivery; that the plaintiffs notified the defendant at the said time and place, and on many occasions thereafter, that they, the plaintiffs, had a binding contract with the said defendant, had a right to possession of the merchandise upon payment, and in spite of this warning the defendant refused to turn over the said tungsten powder to the plaintiffs.

12. Plaintiffs state that the other two items purchased (at the same time and place as the said tungsten powder) were delivered to the plaintiffs and paid for by them some two or three months after plaintiffs' purchase.

13. Plaintiffs further state that the market value of the said tungsten powder on or about March 10, 1954 was not less than to wit: $5.95 per pound.

14. Plaintiffs therefore give the court to understand and be informed that they have suffered damages at the hands of the defendant in the sum of to wit: $805,000.00 for which they bring this suit and ask judgment for such amount against the defendant, Union Carbide & Carbon Corporation, plus interest thereon from to wit: March 10, 1954, the date of the breach of contract, to date of entry of judgment herein.

COUNT II.

Paragraphs 1 to 12 inclusive. Plaintiffs iterate here paragraphs 1 to 12 of the first count and adopt the same as the same numbered paragraphs in this count as though fully set forth herein and proceed as follows:

13. Plaintiffs state that on the said to wit: March 6, 1954 the title to all of the said merchandise passed to said plaintiffs, subject to payment therefor, and that therefore the plaintiffs have a right to the possession of the said merchandise upon making such payment. The plaintiffs here ask the court to decree and declare that title thereto in and to the said tungsten powder vests and rests in them, the plaintiffs, and ask that a declaratory judgment be entered herein against said defendant, ordering it and directing it to turn over to plaintiff the remainder of the said merchandise to wit: 172,867 pounds of powdered tungsten, carbon reduced, 99% tungsten, upon payment of the purchase price therefor, according to the average per pound bid submitted by the plaintiff of $1.304645 and approved by the U. S. Government.

COUNT III.

Paragraphs 1 to 13. Plaintiffs here adopt paragraphs 1 to 13 inclusive of the second count of this complaint as same numbered paragraphs of this count and proceed as follows:

14. Plaintiffs ask as aforesaid for declaratory judgment, directing the turning over of said tungsten powder if same is still in possession or the control of the defendant, and in the alternative, if it is not in the possession of the defendant or under its control, the plaintiffs have judgment against the defendant in the said sum to wit: $805,000.00 plus interest thereon at the rate of 5% per

annum from the date of the breach of contract, March 10, 1954, pursuant to law, which interest at this time amounts to wit: $40,000.00.

Plaintiffs further pray that process be issued, either summons or subpoena, in due form of law, directed to the U. S. Marshal, commanding him to serve the same upon the defendant, to the end that the defendant appear in
10 this court and plead to the foregoing complaint, and that upon issues being joined under this complaint and the defendant's pleadings, and a full hearing had, the court find the issues in favor of the plaintiffs and grant relief as prayed for in the foregoing complaint.

Rose Finsky, et al.
Irwin Baskes, Attorney for Plaintiffs

Verification by Maxwell N. Andalman.

11 EXHIBIT 1, [to Complaint]

"HAYNES STELLITE COMPANY

A Division of Union Carbide and Carbon Corporation

UCC

General Office and Works . . . Kokomo, Indiana

February 11, 1954

Surplex-Sales
2409 South LaSalle Street
Chicago 16, Illinois
Attention: Mr. J. M. Andalman

Gentlemen:

We solicit offers for the following material:

Approximate Quantity	Rough Description
13,818 lbs.	80% Tungsten, 4.8% Lampblack, 15.2% Cobalt
15,248 "	94% Tungsten, 6% Lampblack
3,161 "	Barium-Stearate Acid
160 "	Stearate-Acid
10,268 "	Black Jet Lampblack
20,560 pcs.	2" x 24" Graphite Electrode Bars, Grade AGX
10,080 "	4" x 58" Graphite Electrode Bars, Grade AGX
40 "	24" x 8" x 12" Grinding Wheels
41 "	30" x 1" x 12" Grinding Wheels
173,205 lbs.	Powdered Tungsten Carbon Reduced 99% Tungsten
13,000 pcs.	Paperboard tube 6-1/2" x 1-7/8".

Bids for this material will be accepted only in writing until 5:00 P.M. standard time, Tuesday, February 23, 1954.

We invite your inspection of this material in our plant at Kokomo, Indiana as no samples will be submitted, and no rejection will be accepted after shipment. The Haynes Stellite Company reserves the right to reject any or all bids, or to accept in part any bid, as to item or portion thereof. Terms of payment will be our option. (Cashiers check, certified check, or sight draft). All material will be shipped F.O.B. our plant, and shipping instructions will be required when material is awarded.

Please address all bids to the Haynes Stellite Company, Kokomo, Indiana, attention of Mr. R. W. Williams.

Yours very truly,
Haynes Stellite Company
(Signed) C. J. Dalton
Assistant Works Purchasing Agent

C. J. Dalton/11

Producers of the Abrasion-Corrosion-and High-Temperature-Resistant Alloys distinguished by the Trade-Marks. Haynes . . Hascrome . . Hastelloy . . Haystellite . . Haynes Stellite-Stellite-Multimet"

12 EXHIBIT "2", [to Complaint]

GOVERNMENT CONTRACT CANCELLATION

Sealed bids in triplicate on following materials must be received by 5 P.M., February 23, 1954.

Approximate Quantity	Rough Description
13,818 Lbs.	80% Tungsten, 4.8% Lampblack, 15.2% Cobalt
15,248 Lbs.	94% Tungsten, 6% Lampblack
3,161 Lbs.	Barium-Stearate Acid
160 Lbs.	Stearate-Acid
10,268 Lbs.	Black-Jet Lampblack
20,560 Lbs.	2" x 24" Graphite Electrode Bars
10,089 Pcs.	4" x 58" Graphite Electrode Bars
40 Pcs.	24" x 8" x 12" Grinding Wheels
41 Pcs.	30" x 1" x 12" Grinding Wheels
173,205 Lbs.	Powdered Tungsten Carbon Reduced 99% Tungsten
13,000 Pieces	Paperboard Tube 6-1/2" x 1-7/8"
287 Pieces	Special Tooling and Fixtures

The Government reserves the right to reject any or all bids.

Terms Cash, F.O.B. Kokomo Plant.

HAYNES STELLITE CO.

A Division of
Union Carbide
& Carbon Corp.

South Lindsay Street Kokomo, Indiana

13 **EXHIBIT 3, [to Complaint]**

"SURPLEX SALES

Not Inc.

2409 S. LaSalle Street
Chicago 16, Ill.

Haynes Stellite Company
Kokomo, Indiana

Attention: Mr. R. W. Williams

Gentlemen:

We today at 3:20 P.M. placed on the Western Union wires a telegram to you bidding on the material covered by your February 11, 1954 letter and included in your offering as shown in your ad in the Waste Trade Journal issue of February 20, 1954, Page 25, after telephoning said bid to you, as follows:

"Your February 11, 1954 letter offering material received. Same is shown on Page 25 of the Waste Trade Journal of February 20, 1954. We refer to each item by numerals 1 to 12, starting from the top and offer for the same as follows:

Item 1: 4¢ per pound
Item 2: 5¢ per pound
Item 3: No Bid
Item 4: No Bid
Item 5: 2.2¢ per pound
Items 6 & 7: For the 30,640 pieces to produce for you $25.10 per net ton for graphite bars.
Item 8: $3.30 each
Item 9: No Bid
Item 10: For 24,750 pounds $1.602 per pound
For 24,750 pounds $1.502 per pound
For 24,750 pounds $1.402 per pound

For 24,750 pounds $1.302 per pound
For 24,750 pounds $1.202 per pound
For 24,750 pounds $1.102 per pound
For balance - - - $1.02 per pound, with the understanding that if the aggregate of our bid exceeds the bids of all others for the total quantity, we expect to be awarded the entire amount, otherwise we expect awards for such of the quantities on which we are high.

Items 11 & 12: No Bids—Terms of payment per your letter, at your option."

We hereby confirm same by letter. Bid by wire was made pursuant to understanding with your Mr. C. J. Dalton, Ass't. Works Purchasing Agent.

Yours very sincerely,
Surplex Sales
By J. M. Andalman, Partner"

JMA:tm

16 Appearance of R. Tieken, U. S. Attorney, for defendant, filed March 16, 1955.

21

ANSWER

(Filed June 10, 1955)

Now Comes Union Carbide and Carbon Corporation, a New York corporation, by R. Tieken, United States Attorney for the Northern District of Illinois, and in answer to the complaint states:

COUNT I.

1. No answer is required to Paragraph 1 of Count I.

2. Defendant admits the allegations contained in Paragraph 2 of Count I.

3. Defendant admits the allegations contained in Paragraph 3 of Count I.

4. Defendant admits the allegations contained in Paragraph 4 of Count I.

5. Defendant denies that it solicited any bids from the plaintiffs during January and February, 1953, but states that all transactions involved herein took place during the year 1954.

6. Defendant admits that it placed certain advertisements in trade publications similar to Exhibit "2" attached to the complaint.

7. Defendant admits that the plaintiffs submitted a 22 bid for various items offered for sale by the defendant.

8. Defendant admits the allegations contained in Paragraph 8 of Count I.

9. Defendant does not have knowledge of the facts and the allegations contained in Paragraph 9 of Count I are not pleaded in sufficient detail to enable the defendant to either admit or deny the allegations contained in Paragraph 9 of Count I of the complaint.

10. Defendant admits that one barrel of tungsten powder was delivered to the plaintiffs and that the plaintiffs paid the sum of $701.68 on account, but states same was delivered at the request of the plaintiffs as a sample and did not constitute partial delivery. Defendant admits that it wrote a letter to the plaintiffs on March 6, 1954, which is set forth in Paragraph 10 of Count I of the complaint. The defendant denies that arrangements were made for delivery of the balance of the tungsten powder and payment therefor as alleged in Paragraph 10 of Count I of the complaint.

11. Defendant admits that it notified the plaintiff that it would not deliver the tungsten powder and admits that the United States government had directed it not to de-

liver the same to the plaintiffs. Defendant admits that the plaintiffs demanded delivery and claimed a right to possession thereof but the defendant denies that the plaintiffs were entitled to delivery or possession of said tungsten powder.

12. Defendant admits the allegations contained in Paragraph 12 of Count I.

13. Defendant denies the allegations contained in Paragraph 13 of Count I.

23 14. Defendant denies that the plaintiffs suffered damages in the amount of $805,000.00, or any other amount, and denies that they are entitled to judgment in said sum, or any other amount.

COUNT II.

1 to 12, both inclusive. Defendant realleges and adopts by reference thereto Paragraphs 1 to 12, both inclusive, of its answer to Count I of the complaint, and adopts the same by reference thereto as its answer to Paragraphs 1 to 12, both inclusive, of Count II of the complaint.

13. Defendant denies that on March 6, 1954, or on any other date, title to all of the merchandise passed to the plaintiffs, and denies that the plaintiffs have a right to possession thereof, and denies that the plaintiffs are entitled to a decree finding title in them, or to a declaratory judgment directing the defendant to turn over the tungsten to the plaintiffs.

COUNT III.

1 to 13, both inclusive. Defendant realleges and adopts by reference thereto Paragraphs 1 to 13, both inclusive, of its answer to Count II of the complaint, and adopts the same by reference thereto as its answers to Paragraphs 1 to 13, both inclusive, of Count III of the complaint.

14. Defendant denies that the plaintiffs are entitled to

a declaratory judgment, and denies that the plaintiffs are entitled to judgment against the defendant, in the amount of $805,000.00, or any other amount, and denies that the plaintiffs are entitled to any interest.

24 The defendant denies that the plaintiffs are entitled to the relief prayed for or any part thereof.

AFFIRMATIVE DEFENSES

As affirmative defenses to Counts I, II, and III of the complaint, the defendant states:

1. That all of the tungsten described in the complaint was at the time of all of the occurrences complained of herein the property of the United States government, which said fact was known or should have been known by the plaintiffs.

2. Any prospective sale of the said tungsten was subject to the applicable United States statutes and regulations then in full force and effect.

3. Under said statutes and regulations the United States of America had a prior right to said property and no contractor or government officer or employee had authority to waive the rights of the United States of America.

4. The purported sale was subject to the approval of the government contracting officer who did not have an unqualified right to act but was bound by the applicable government statutes and regulations. That under said applicable statutes and regulations the said tungsten should have been first offered to the General Services Administration for stockpiling as critical materials. He was bound by the applicable statutes, which include the Strategic and Critical Materials Stockpiling Act (53 Stat. 811; 60 Stat. 596, 50 U.S.C. 98, *et seq.*), and the Federal Property and Administrative Services Act of 1949, as amended (63 Stat. 378, 40 U.S.C. 471, *et seq.*). He was also bound by the regulations of the General Services Administration,

the Department of Defense, and the Department of the Army.

5. In this connection, Section 202 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 483), requires the Administrator of General Services to prescribe policies and methods for the maximum utilization of excess property by Federal executive agencies and to provide for its transfer among Federal agencies. The definition of surplus property contained in Section 3 of this statute (40 U.S.C. 472), requires that before excess Federal property may be designated as surplus, a determination must be made that it is not required for the needs and the discharge of the responsibilities of all Federal agencies. Similarly, the Administrator of General Services is authorized by Section 203(f) of this statute, (40 U.S.C. 484(f)), to regulate the disposal of contractor inventory. Contractor Inventory is defined by Section 3(k) of this statute (40 U.S.C. 472(k), as:—

> "The term 'contractor inventory' means (1) any property acquired by and in the possession of a contractor or subcontractor under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and, (2) any property which the Government is obligated or has the option to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government."

Section 55.17 of the regulations of the Administrator of General Services, issued pursuant to this statute, defines contractor inventory in the substantially same terms. These regulations provide that the disposal of surplus property

shall be in such manner as to facilitate production for the national defense (Sec. 55.22); authorize the disposition of contractor inventory by executive agencies under such orders and directives as the executive agency may prescribe (Sec. 55.61); and require that the disposal of substantial quantities of material by a contractor "shall be subject to prior approval by the contracting agency in accordance with criteria established by that agency." (Sec. 55.67) These regulations were published in the Federal Register at 15 Fed. Reg. 6492 and 7767; in the Code of Federal Regulations at 44 CFR, 1953 Supp., 55 *et seq.*; and in the appendix to Title 40, United States Code. The unpublished regulations of the Administrator of General Services include Emergency Procurement Regulation No. 1, requiring that tungsten and tungsten powder in contractor inventory be screened for stockpiling as a critical and strategic material.

6. Special Regulations 755-80-50 promulgated by the Secretary of the Army also require the screening of this tungsten powder for stockpiling. Moreover, Section 597.603-3 of the regulations of the Department of the Army provides that "all reportable Contractor inventory . . . shall be screened concurrently with the Department of Defense screening agency and with General Services Administration . . . " (underscoring supplied). This regulation was published in the Federal Register on 22 January 1954 at Page 402 (19 Fed. Reg. 402).

7. In addition to these regulations, the Government Contracting Officer was subject to Part 407 of the Joint Regulations of the Armed Forces, which govern the termination of contracts and the disposition of contractor inventory. These regulations appeared in 17 Fed. Reg. 1791, *et seq.* and may be found in 32 CFR, 1953 Supp., 407, *et seq.*

8. The definition of contractor inventory as contained in Section 407.209 of these Joint Regulations includes tungsten powder.

9. Section 407.606-1 of these Joint Regulations requires usable property included in contractor inventory to be screened within the Departments of the Department of Defense and provides that, subject to certain exceptions obviously not relevant to the tungsten powder that is the subject of this suit:

> "(d) Items excess to the Department of Defense will be submitted as required by regulations of General Services Administration to the General Services Administration for further screening. * * * "

Section 407.606-2 of these Joint Regulations specifically prohibits the disposal of any contractor inventory required by applicable regulations of the General Services Administration to be referred to that Administration until its release in writing or appropriate instructions for its distribution within the Government, have been received from that Administration.

10. Inasmuch as the contract under which the tungsten powder involved in this suit was generated was a Government contract terminated for convenience, and inasmuch as the Government had the option to take over this tungsten powder, there can be no denying that the property was subject to all of the above requirements for screening. Unless and until there was compliance with this screening requirement, the Government Contracting Officer could not approve its sale. Moreover, inasmuch as this property was required by the regulations to be submitted to General Services Administration for screening for stockpiling, the sale of the tungsten powder by the defendant could not be approved until a written release was received from the General Services Administration. Thus, the Contracting

Officer's purported approval of the sale to the plaintiffs
28 was a nullity, without legal force and effect, and enabled the plaintiffs to acquire no rights.

11. Plaintiffs were bound by the aforesaid statutes and regulations and are charged with notice of all items published in the Federal Register.

12. The requirement that the proposed sale involved herein was subject to screening and release by the General Services Administration before the sale could be validly approved by the government contracting officer is expressly set forth in the joint regulations of the Armed Forces, which were published in both the Federal Register and the Code of Federal Regulations. The plaintiffs were therefore either actually or constructively on notice that the General Services Administration would have to act with respect to the tungsten powder, and it was incumbent upon the plaintiffs to ascertain that the necessary release had been obtained or otherwise risk the possibility that the General Services Administration would requisition said tungsten powder.

13. The plaintiffs at no time ever acquired a valid title or claim to the said tungsten powder.

R. Tieken
United States Attorney

Affidavit of mailing.

34

MOTION FOR SUMMARY JUDGMENT

(Filed Feb. 6, 1956)

The defendant, Union Carbide & Carbon Corp., a New York corporation, owners and operators of division thereof known as Haynes, Stellite Co., by their attorney, R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, hereby moves this Court to enter

Summary Judgment for the defendant, in accordance with the Federal Rules of Civil Procedure 56(b) and (c), on the ground that the pleadings and affidavits hereto attached and marked Exhibits "A" and "B" show that the defendant is entitled to a judgment as a matter of law.

R. Tieken
United States Attorney

RCB:sak

35 Attached EXHIBIT "A"

City of Washington,
District of Columbia—ss.

AFFIDAVIT

IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

A. J. Walsh, being first duly sworn, on oath deposes and says that:

He resides at 3726 Connecticut Avenue, N.W., Washington, D.C., and is Commissioner, Emergency Procurement Service, General Services Administration, United States Government.

As Commissioner of Emergency Procurement Service, General Services Administration, he is responsible for the maintenance of the records of General Services Administration covering such operations of the General Services Administration under the Strategic and Critical Materials Stock Piling Act, 60 Stat. 598, as are relevant to the matters covered by this affidavit.

Such records show

(a) that tungsten powder located at the Haynes-Stellite Co., Kokomo, Indiana, was offered to the Emergency Procurement Service, General Services Administration, by Report of Strategic and Critical Materials, numbered 125-

ORDEH-IDOPD-1, and that such report, which was made by the Property Disposal officer of the New York Ordnance District, was delivered to the Emergency Procurement Service, General Services Administration, on March 16, 1954,

(b) that said tungsten powder was not offered to the Emergency Procurement Service, General Services
36 Administration prior to March 16, 1954,

(c) that said tungsten powder was accepted by the Emergency Procurement Service, General Services Administration on March 16, 1954 for the national stock pile pursuant to the Strategic and Critical Materials Stock Piling Act, and

(d) that at no time prior to March 16, 1954 was General Services Administration ever requested to release said tungsten powder for sale nor did General Services Administration ever authorize anyone to offer said tungsten powder for sale.

A. J. Walsh
Affiant

Jurat

37 Attached EXHIBIT "B"

State of New York,
County of New York—ss.

AFFIDAVIT
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

Henry C. Laskin, being first duly sworn, on oath deposes and says that:

He resides at 193-03 39th Avenue, Flushing, New York, and is the principal Contracting Officer, New York Ordnance District of the United States Army Ordnance Corps.

Affiant further deposes and says that on the 11th day of March, 1953 he was the government contracting officer charged with the representation of the government interests in connection with Ordnance Corps Contract No. DA-30-069-ORD-462; that said contract was terminated for the convenience of the government on March 11, 1953. Among affiant's duties at that time were to ascertain whether or not tungsten powder, constituting the subject matter of this suit, was required for use by any other branch of the Army Ordnance Corps, and to also offer the same to the General Services Administration and ascertain whether or not it was required by said governmental agency for stockpiling as a strategic and critical material in accordance with the applicable statutes and regulations directing that such material be transferred to the National Defense stock pile. That under said statutes and regulations affiant was charged with the duty of so offering said material to the General Services Administration and obtaining a release from said governmental agency prior to authorizing the contractor to offer said tungsten powder for public sale.

That although the tungsten powder involved in this suit was offered to other branches of the Army Ordnance Corps, affiant failed to offer it to General Services Administration prior to the time he authorized the contractor to offer
38 said material for public sale. That at no time did affiant or any other representative of the contracting officer obtain a release from General Services Administration granting authority to offer the subject matter of this suit for public sale.

Affiant makes this affidavit upon his personal knowledge and upon reports made to affiant by the Property Disposal Officer and other personnel of New York Ordnance District in due course of business and states that all of

the facts above set forth are true, and if affiant is called as a witness on the trial of the above case, he is competent to testify to said facts.

– Henry C. Laskin
Contracting Officer

Jurat

39

EXCERPT FROM BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

The plaintiffs instituted this suit to recover damages for the failure of the defendant to deliver 172,767 pounds of tungsten powder alleged to have been purchased from the defendant. The defendant was a fixed price contractor with the Ordnance Corps under Contract No. DA-30-069-ORD-462. This contract was terminated for the convenience of the Government on March 11, 1953. The defendant's termination inventory included 173,205 pounds of tungsten powder and the Government under the contract had an option to acquire this tungsten powder.

The defendant advertised for bids for this tungsten powder; the advertisement stating that the material was "Government Contract Cancellation"; and that the Government reserved the right to reject any and all bids. Although the Government Contracting Officer screened the tungsten powder within the Ordnance Corps he failed to screen it through General Services Administration. This officer, after determining that the tungsten powder was not required within the Ordnance Corps, forwarded on March 5, 1954 to the defendant an approval of this sale
40 to the plaintiffs of the tungsten powder. Thereafter, on March 6, 1954, the plaintiffs paid for and took possession of 438 pounds of tungsten powder. They did not

take either constructive or actual possession of the remaining 172,767 pounds of tungsten powder and have not paid for it. Subsequently, to the time the plaintiffs took possession of the 438 pounds of tungsten powder, the General Services Administration learned of the purported sales to the plaintiffs; that the tungsten powder had not been screened for stockpiling as a strategic and critical material as required by applicable statutes and regulations. The General Services Administration directed that the tungsten powder be transferred to the national defense stockpile. The plaintiffs were informed of the failure of the government contracting officer to either screen the tungsten powder, in accordance with the requirements of applicable statutes and published regulations, or to obtain a release of the tungsten powder from General Services Administration, and further, that in the absence of said screening and release, the government contracting officer was without authority to approve the sales to the plaintiffs. Upon the refusal of the defendant herein, as ordered by the United States Government to deliver the 172,767 pounds of tungsten powder, the plaintiffs filed a complaint consisting of three counts and asking damages in the amount of $805,000.00. The first count asks relief in the aforesaid sum on the grounds of a breach of contract. The relief requested in the second count is for a declaratory judgment to be entered against the defendant herein, ordering it to turn over to the plaintiffs the remainder of the tungsten powder delivered, which was refused. The plaintiffs ask in count three that a declaratory judgment be entered directing the defendant herein to turn over the
41 remaining tungsten powder, if still within the possession and control of this defendant, or in lieu thereof, for judgment in the sum of $805,000.00, together with interest at the rate of 5% per annum from the date of the

alleged breach of contract, said interest amounting, at the time of the filing of the complaint, to $40,000.00.

• • •

53

ORDER

Entered March 5, 1956

Pursuant to stipulation between the parties hereto, It Is Hereby Ordered that leave be and is hereby given the plaintiffs to file, instanter, an amendment to their complaint; and

It Is Further Ordered that the defendant answer, or otherwise plead to, said amendment to said complaint, on or before April 30, 1956.

Enter:

John P. Barnes

Dated: Mar 5 1956 Judge

54

AMENDMENT TO COMPLAINT

(Filed March 5, 1956)

Now come the plaintiffs, Rose Finsky, Avrum N. Andalman, Joseph M. Andalman, Lee B. Andalman, Yetta S. Andalman, and Maxwell N. Andalman, co-partners doing business under the name of Surplex Sales, a co-partnership, and by leave of Court first had and obtained, file this additional Count, Count IV, as an amendment to their complaint herein, and state:

COUNT IV

1, 2, 3 and 4. Plaintiffs incorporate herein, by reference, paragraphs 1 to 4 inclusive, of Count I of the Com-
55 plaint, and adopt the same as the same numbered

paragraph in this Court as though fully set forth herein.

5. On the 13th day of February, 1952, the United States of America, acting through the Ordnance Corps of the Department of the Army, entered into a contract with the defendant (identified, as plaintiffs were later informed, as Contract No. DA-30-069-ORD-462) involving, among other things, the tungsten powder which is involved in this proceeding. The said contract pertained to the National Defense, as the plaintiffs have been advised and informed by the defendant and by instrumentalities of the Government of the United States, and was "classified" that is, secret. Its contents could be and are known only to certain persons connected with the defendant and governmental authorities. The plaintiffs could not, did not, and do not know the terms and provisions of the said contract, and the defendant, and the Government, have refused, and refuse, to disclose the terms thereof to plaintiffs. Likewise, everything done, or not done, pursuant to the said contract, was "classified" and the plaintiffs could not. did not, and do not, know what was done, or not done, thereunder. The plaintiffs, in their dealings with the defendant, as more fully hereinafter set forth, necessarily had a right and did rely upon the express and implied representations and warranties of the defendant with respect thereto, and did in fact do so at all times hereinafter mentioned; and the plaintiffs had the right to assume, and did in fact assume, by reason of such representations and warranties, that the defendant was acting at all times in
56 compliance with the terms of the said contract, and under valid direction of the Government of the United States and its instrumentalities. The burden of ascertaining the validity and propriety of any and all action and inaction under the said contract, and particularly with

respect to the said tungsten powder, was upon the defendant, and not the plaintiffs.

6. The said contract had been terminated for the convenience of the Government on March 11, 1953, and the defendant had been directed by the Government to sell the said tungsten powder and other materials.

7. Under date of February 11, 1954, the defendant, from its offices in Kokomo, Indiana, wrote to the plaintiffs unconditionally inviting and soliciting the plaintiffs to bid in writing for the said tungsten powder and other materials; a true and correct copy of said writing is attached to the complaint herein as Exhibit "1" and is by express reference made a part of this additional Count, Count IV. The said letter nowhere referred directly, nor indirectly, to any alleged right, title or interest of the Government of the United States, in and to the said tungsten powder or other materials, and in no way connected the sale thereof with any action or inaction on the part of the Government of the United States or any instrumentalities thereof. The plaintiffs had the right to assume, by reason thereof, that if their bids were accepted by the defendant, then the plaintiffs had the unqualified and indefeasible right to obtain the materials covered by the said bids, subject only to payment therefor.

57 8. In reliance upon the said solicitation by the defendant, and with no knowledge of the contents of the said contract between defendant and the Government of the United States, nor of the terms thereof, nor of any action or inaction with respect thereto by any one which could or did effect the title to said merchandise, the plaintiffs made written bids for the said tungsten powder and other merchandise, a copy of which said bids are set forth in Exhibit "3" of the complaint herein, and are incorporated in this additional Count with the same force and effect as if set forth herein in full.

9. Plaintiffs submitted to the defendant their bids for the said various items within the time specified in the letter from defendant, that is to say, by-to-wit, 5:00 P.M., February 23, 1954.

10. On, to-wit, the 6th day of March, 1954, the defendant, at Kokomo, Indiana, delivered to the plaintiffs a communication on the letterhead of the defendant, Haynes Stellite Co. Division, reading as follows:

"March 6, 1954

Surplex Sales
2409 So. LaSalle Street
Chicago, Illinois

Gentlemen:

This is to advise that you have been awarded approximately

173205 lbs. powdered tungsten, carbon reduced, 99% tungsten
10268 lbs. lamp black
40 grinding wheels

This award was granted in accordance with your bid of February 23, 1954.

Yours truly,
(Signed) G. H. Shelton
G. H. Shelton

58 11. The said communication was unqualified and unconditional in language, and by reason thereof, and by reason of the laws of the State of Indiana, title to the said tungsten powder and other merchandise passed to the plaintiffs, subject only to their obligation to pay therefor; and there was thereby a representation and warranty on the part of the defendant that it had the right at that time to sell the said tungsten powder and other material to the plaintiffs, that it had good title thereto, and that

the plaintiffs would have quiet enjoyment of the possession and use thereof. The plaintiffs did in fact rely upon the said representations and warranties and by reason thereof went to great expense and trouble and committed themselves to undertakings of various kinds to certain third parties in connection with which undertakings legal obligation and damages have or may have been incurred by the plaintiffs, for all of which defendant is legally liable.

12. On, to-wit, the 6th day of March, 1954, the defendant, at its plant in Kokomo, Indiana, concurrently with the delivery of the said award to plaintiffs, made a partial delivery to the plaintiffs of one (1) barrel of said tungsten powder purchased by plaintiffs from the defendant. Plaintiffs paid defendant the sum of $701.68 on account of the total amount due to the defendant for the said tungsten powder and other materials. At the said time and place it was orally acknowledged by defendant, and orally agreed between the parties, that title to all of the tungsten powder and the other materials had passed to the plaintiffs, and that defendant would retain custody thereof for the
59 benefit of the plaintiffs until payment therefor. At the same time and place it was further agreed orally by and between the plaintiffs and the defendant that the plaintiffs would pay to the defendant on March 11, 1954, the additional sum of between $110,000 and $115,000 and concurrently therewith receive from the defendant one-third of the tungsten powder purchased by them, and that on or before April 1, 1954 the plaintiffs would pay the balance of approximately $116,000 and concurrently receive the balance of the said tungsten powder and the other materials.

13. The plaintiffs have never at any time released the defendant from the contractual obligations to the plaintiffs, and have never waived any of their rights against the de-

fendant, or in and to the said tungsten powder and other materials, and have always maintained and asserted that all right and title in and to said tungsten powder and other materials was and is in plaintiffs.

14. On the 10th day of March, 1954, after the plaintiffs had gone to the said great expense and trouble and had obligated themselves to third parties in the manner aforesaid, the defendant for the first time notified the plaintiffs that it would not deliver to the plaintiffs the said tungsten powder, giving as its alleged reason for such breach of contract and its violation of the plaintiffs' vested rights, an alleged suspension order issued by a contracting officer of the Department of the Army of the United States,

despite the fact that the said contracting officer had
60 theretofore advised the defendant and the plaintiffs
that the plaintiff's bids for the tungsten powder and the other materials were acceptable. Thereupon, the plaintiffs again demanded possession of the said tungsten powder and other materials and offered payment of same at the agreed time and in the agreed manner; whereupon, the defendant delivered to plaintiffs the materials purchased by it as aforesaid other than the balance of said tungsten powder.

15. The plaintiffs have repeatedly requested and urged the defendant to take any and all action required to persuade or compel any Governmental agencies professing to suspend or otherwise interfering with the delivery of said tungsten powder to the plaintiff to rescind such action and to cease interfering with such delivery, but the defendant failed and refused, and continues to fail and refuse, to take any such action and has failed and refused and continues to fail and refuse, despite plaintiffs' repeated requests, to appeal from or review such Governmental interference.

16. Plaintiffs are informed and believe, and upon such information and belief state the fact to be, that since the

sale to the plaintiffs on March 6, 1954, pursuant to said award to them of said tungsten powder and other materials, the defendant has wrongfully turned over to the Government of the United States the said balance of the tungsten powder, and has received from the Government therefor property, cash or credit in the said sum of

$1,280,000.00, which amount, less the balance of the
61 purchase price of $225,254.61, or $1,054,745.39, belongs to the plaintiffs. It is inequitable, unlawful and unconscionable for the defendant to retain the said sum of $1,280,000.00 so received by defendant from the Government for said tungsten powder without paying unto the plaintiffs said sum of $1,054,745.39 which rightfully belongs to the plaintiffs and should be paid to them by the defendant, together with interest at the lawful rate from March 6, 1954 to date of rendition of judgment herein.

17. Although the burden, at all times, was on the defendant to do so, the plaintiffs have attempted to obtain a review and reversal of the said wrongful interference by the Government. Plaintiffs were advised by the Government that the plaintiffs are not privy to the contract between the defendant and the Government and that the plaintiffs cannot appeal from any decisions or rulings by the Government in connection therewith.

18. On, to-wit, March 11, 1954, the plaintiffs were advised by the Property Disposal Office of the Department of the Army, that there would be a breach of contract by the defendant so far as the plaintiffs were concerned, if the balance of the said tungsten powder be not delivered to the plaintiffs.

19. The plaintiffs had had previous dealings with the defendant in connection with other contract termination inventory, including a substantial transaction, in, to-wit, October, 1953, with respect to cobalt powder, a material

which plaintiffs now know was then on the strategic stockpiling list of the General Services Administration. In dealing, in the present instance, with the tungsten powder
62 in question, the plaintiffs pursued the same procedure as in the case of said cobalt powder. They were not informed by the defendant, or anyone else, that any different procedures need be followed. The plaintiffs therefore had these additional reasons and previous experience, and the right to rely upon the express or implied representations and warranties of the defendant as to the tungsten powder.

20. On, to-wit, August 4, 1954, the General Services Administration of the Government, acting through its General Counsel, wrote the plaintiffs that the General Services Administration "take no position with respect to this matter, insofar as the rights or obligations between you and Haynes Stellite Company are concerned."

21. Subsequently, on-to-wit, September 21, 1954, the General Services Administration wrote the plaintiffs that it had not given any instructions of any kind to the Department of the Army with respect to the said tungsten powder, and that what it had written or told the Department of the Army was only "advisory, and not in any sense a direction or instruction that had to be followed."

22. The Department of the Army had screened the tungsten powder involved in this suit prior to its approval of the said bid of plaintiffs and had found that the Department of the Army had no need therefor.

63 23. Neither the Department of the Army, the General Services Administration, nor any other agency or instrumentality of the United States, ever took or acquired possession of the said tungsten powder, or ever requested transfer of title thereto, prior to the said award and sale to the plaintiffs and until some time after the defendant violated its contract with the plaintiffs.

24. The plaintiffs never had any knowledge of the existence of or provisions of the so-called Emergency Procurement Regulation No. 1 of the General Services Administration (which regulation is the pretext upon which the defendant relies for violating its contract with the plaintiffs) until after the plaintiffs' bid had been approved by the Department of the Army and by the defendant and until after the award had been delivered by the defendant to the plaintiffs and the sale consummated and partial payment and partial delivery had been made. The said regulation was never published in the Federal Register, and the plaintiffs never had any actual or constructive knowledge or notices thereof, and the said regulation was and is in no way binding upon the plaintiffs. If the said Regulation had or has any effect on the defendant, insofar as the said tungsten powder is concerned, this could not and cannot impair the rights of plaintiffs which were then already vested.

25. Section 5 of the said Emergency Procurement Regulation No. 1 provides as follows:

64 "Regulations and Orders of Other Agencies. In taking action pursuant to this Regulation, consideration must be given to applicable regulations and orders of other Government agencies, such as the National Production Authority."

26. Special Regulation No. 755-5-2 of the Department of the Army provides, in Section IV, 25 i, as follows:

"After awards have been made withdrawals cannot be effected."

27. By reason of the foregoing paragraphs 25 and 26, neither the General Services Administration nor the Department of the Army, nor the defendant, have any right or authority to set aside the award and sale to the plain-

tiffs of the said tungsten powder, nor of any other materials. The rights of the plaintiffs have vested and no agency nor instrumentality of the Government, nor the defendant, can validly take the said balance of plaintiffs said tungsten powder without due process of law and the payment of just compensation under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, and under the Constitution of the State of Indiana.

28. By reason of the foregoing, the plaintiffs have suffered a loss and damage in amount of One Million Fifty Four Thousand, Seven Hundred Forty Five and 39/100 ($1,054,745.39) Dollars, plus statutory interest from March 6, 1954.

65 WHEREFORE, plaintiffs ask for judgment against the defendant in the sum of One Million Fifty Four Thousand, Seven Hundred Forty Five and 39/100 Dollars ($1,054,745.39), with interest thereon from March 6, 1954, and for such other and further relief in the premises as to the Court may seem meet.

Rose Finsky, et al., doing business under the name of Surplex Sales, a co-partnership,

By Maxwell N. Andalman
one of the plaintiffs herein and the duly authorized agent of the others.

Verification by Maxwell N. Andalman.

66

NOTICE

(Filed March 20, 1956)

To: Robert Tieken
Attorney for Defendant
United States Courthouse
Clark and Adams Streets
Chicago, Illinois

Please Take Notice that we shall appear before the Honorable Michael L. Igoe, Judge of the United States District Court, in the courtroom usually occupied by him, or before any Judge sitting in his place and stead in the United States Courthouse, at Clark and Adams Streets, in Chicago, Illinois, on Tuesday, March 20, 1956, at the opening of court, at 10:00 o'clock A.M., or at such time and place as such motions shall be called, and shall present the attached motion for production of documents and for the entry of an order in accordance therewith and the attached draft, and for such other and further orders as to the Court shall seem meet.

At Which Time And Place you may appear if you so see fit.

Irwin S. Baskes
Elmer Gertz
Attorneys for Plaintiffs

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ORDER

FOR PRODUCTION OF DOCUMENTS

(Entered March 20, 1956)

On verified motion of the plaintiffs, after due notice, and the Court having heard the arguments of counsel, and being fully advised in the premises, and having jurisdiction of the subject matter hereof and of the parties hereto,

It Is Ordered that the defendant, Union Carbide & Carbon Corp., a New York Corporation, Owners and Operators of Division thereof known as Haynes Stellite Co., produce and permit plaintiffs to inspect and to copy, or, alternatively, to furnish, within ten (10) days from the date hereof, authenticated copies to plaintiffs, at plaintiffs' expense, each of the following document:

1. Contract of, to-wit, February 13, 1952, between The United States of America (acting through the Ord-
72 nance Corps of the Department of the Army), and Haynes Stellite Co., Division of Union Carbide & Carbon Corp., identified as Contract No. DA-30-069-ORD-462;
2. Any and all notices of termination of the said contract issued by or in behalf of the United States, or any instrumentality thereof, including the notice dated, or as of, to-wit, March 11, 1953;
3. Any and all directions received by defendant to sell the tungsten powder involved in this proceeding, issued by or in behalf of the United States, or any instrumentality thereof;
4. Any and all directions received by defendant to sell certain cobalt powder (sold in, to-wit, October 1953 to plaintiffs) issued by or in behalf of the United States or any instrumentality thereof;
5. Any and all approvals of sales and awards of the said tungsten powder to plaintiffs, received by defendant and issued by or in behalf of the United States, or any instrumentality thereof, including the approval of award up to and including, to-wit, March 5, 1954;
6. Any and all approvals of sales and awards of the said cobalt powder to plaintiffs, received by defendand issued by or in behalf of the United States, or any instrumentality thereof;

7. Any and all instruments and documents affecting or transferring title to the said tungsten powder, whether issued to or by the defendant or to or by the United States, or any instrumentality thereof;

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8. Any and all instruments affecting or transferring title to the said cobalt powder, whether issued to or by the defendant or to or by the United States, or any instrumentality thereof;

9. Any and all correspondence, of every kind and character, by and between defendant and the United States, or any instrumentality thereof, involving the said tungsten powder or plaintiffs, written, dated, received or sent subsequent to February 23, 1954, and up to and including the date when the instant suit was filed.

Enter:

Igoe

Judge

Dated: March 20, 1956.

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ANSWER OF THE DEFENDANT, UNION CARBIDE & CARBON CORP., TO THE AMENDMENT TO THE COMPLAINT

(Filed May 10, 1956)

Now Comes Union Carbide & Carbon Corp., a New York corporation, by R. Tieken, United States Attorney for the Northern District of Illinois, and in answer to the amendment to the complaint states:

COUNT IV

1, 2, 3 and 4. Defendant incorporates by reference thereto Paragraphs 1 to 4, both inclusive, of its answer to Count I of the complaint and adopts the same as the

same numbered paragraphs of its answer to Count IV of the amendment to the complaint as though fully set forth and repeated verbatim herein.

5. Defendant admits the execution of the contract on or about February 13, 1952. Defendant admits said contract pertained to the national defense and was classified material. Defendant denies that the plaintiffs did not know the terms and conditions of the contract with reference to the disposal of the property involved herein, but further states the fact to be that from the very beginning of the negotiations the plaintiffs were informed and knew that they were dealing with property which had been the subject of the contract between the defendant and the United States. Being charged with notice, the plaintiffs did not have a right to rely upon any representations or warranties inasmuch as they either knew or should have known that all of the acts of the defendant were subject to the terms of the contract of the defendant with the United States and the applicable federal statutes and regulations. Defendant denies the burden of ascertaining the validity and propriety of any and all actions with respect to the tungsten powder was upon the defendant, but states the fact to be that the plaintiffs either knew or should have known and were thereby charged with notice that any dealings with said tungsten powder could only be made subject to the federal statutes and regulations.

6. Defendant admits the allegations contained in Paragraph 6 but states that the sale of the said tungsten powder and other materials was subject to the then existing federal statutes and regulations. Plaintiffs either knew or were charged with notice thereof.

7. Defendant admits that the letter of February 11, 1954 was written but states that regardless of the contents

thereof same was subject to the prior rights of the United States government and that plaintiffs either knew or should have known of said fact. Plaintiffs had knowledge that this material was a basis of the contract between the
82 defendant and the United States and had no right to assume any of the facts alleged in Paragraph 7 of Count IV.

8. Defendant admits the bid made by the plaintiffs but denies it was made upon the reliance of any representation made by the defendant and denies it was made without knowledge of the contract between the defendant and the United States government but states the fact to be that said bid was made subject to the prior rights of the United States of America and the plaintiffs either knew or were chargeable with notice of said fact.

9. Defendant admits the allegations contained in Paragraph 9 of Count IV.

10. Defendant admits the allegations contained in Paragraph 10 of Count IV but further states the fact to be that said communication was delivered subject to all of the terms and provisions of the contract between the defendant and the United States of America and the existing federal statutes and regulations.

11. Defendant denies that by virtue of said communication or the laws of Indiana that title to the tungsten powder and other merchandise passed to the plaintiffs and denies the remaining allegations of Paragraph 11 of Count IV. Defendant further states that the federal statutes and regulations govern the dealings between the parties hereto and cannot be changed by any communications or the laws of the State of Indiana.

12. Defendant denies the delivery of the one barrel of tungsten on March 6, 1954 constituted a partial delivery but states the fact to be that said delivery was merely

83 made at the request of the said plaintiffs to obtain a sample of the said tungsten powder, so that they may have the same analyzed and submit samples to other parties for the purpose of resale. Defendant denies it was orally agreed or acknowledged between the parties that title to all of the tungsten powder and other merchandise had passed to the plaintiffs or that the defendant would retain custody thereof for the benefit of the plaintiffs. Defendant denies all of the remaining allegations contained in Paragraph 12 of Count IV with reference to further alleged oral agreement between the parties.

13. Defendant denies that it has any contractual obligations to the plaintiffs and further denies that the plaintiffs have any right or title in and to the tungsten powder and other material.

14. Defendant denies that the plaintiffs had gone to any expense or had obligated themselves to any third parties. Defendant admits that it notified the plaintiffs that the tungsten powder could not be sold due to a suspension order but the defendant denies that the contracting officer had advised the plaintiffs that it could have the same. Defendant admits the delivery to the plaintiffs of the materials other than the tungsten powder but states that said delivery was a separate transaction.

15. Defendant states in answer to Paragraph 15 of Count IV that it could not take any action to interfere with the acts of the United States of America, pursuant to existing federal statutes and regulations, and defendant denies that it was under any obligation to the plaintiffs to do so.

16. Defendant denies that there was a valid sale 84 to the plaintiffs on March 6, 1954, or any other date. Defendant denies it wrongfully turned the balance of the tungsten powder over to the United States govern-

ment and denies any credit received from the government should be paid to the plaintiffs.

17. Defendant denies it had any burden to attempt to obtain a review and reversal of the order of the government issued to the existing federal statutes and regulations.

18. Defendant denies the allegations contained in Paragraph 18 of Count IV.

19. Defendant states that all of the allegations contained in Paragraph 19 of Count IV with reference to other dealings between the parties hereto are immaterial and do not require any answer. Defendant denies previous dealings between the parties hereto can be used by the plaintiffs to avoid the effect of the federal statutes and regulations then in full force and effect.

20. Defendant states that the plaintiffs have alleged only part of the letter from the General Counsel of General Services Administration, but further states the fact to be that said letter specifically pointed out that neither the statutes nor the regulations were complied with and that the property could not be sold to the plaintiffs.

21. The allegations contained in Paragraph 21 of Count IV are inaccurate and incorrect and the defendant denies the same inasmuch as the allegations contain only a part of the letter written on August 4, 1954. Said letter, in
85 fact, specifically stated that the attention of the Department of the Army had been called to the existing regulations.

22. The allegations contained in Paragraph 22 of Count IV are immaterial and require no answer.

23. Defendant denies that the plaintiff ever had a valid sale or contract with the defendant but states that at all times all dealings between the parties hereto were subject to existing federal statutes and regulations.

24. Defendants deny that the plaintiffs did not have any knowledge of the merchandise procurement regulation No. 1 of the General Services Administration and states same is binding upon the plaintiffs whether or not it was published in the Federal Register.

25. Defendant admits the allegations contained in Paragraph 25 of Count IV but states it is not applicable herein.

26. Defendant admits the allegations contained in Paragraph 26 of Count IV but denies it is applicable to the transaction herein.

27. Defendant denies that General Services Administration or the Department of the Army did not have prior rights to the tungsten powder, which was superior to those of the plaintiffs. Defendant denies that the plaintiffs had any vested rights in said property and further denies each and every allegation contained in Paragraph 27 in Count IV.

28. Defendant denies the allegations contained in
86 Paragraph 28 of Count IV and further denies that the plaintiffs are entitled to judgment herein in the amount claimed, or any other amount.

R. Tieken
United States Attorney

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RESPONSE TO FURTHER REQUEST FOR ADMISSIONS

(Filed June 6, 1956).

Union Carbide and Carbon Corporation, the defendant, makes the following admissions and denials in response to the further request for admissions served on the defendant on March 16th, 1956 by the plaintiffs.

Request (a). Defendant denies that it had title to the tungsten powder in question on the date indicated,
91 contends that title was in the Government on such

date by reason of the partial payments clause of Contract DA-30-069-ORD-462 under which defendant acquired said tungsten powder, but admits it had possession of 172,723 pounds of such powder on such date.

Request (b). Defendant admits having possession of the 438 pounds of the said tungsten powder at the time indicated but denies having title thereto at such time.

Request (c). Defendant admits that possession of 438 pounds of tungsten powder was delivered to plaintiffs at plaintiffs' request as a sample. Whether or not title to such 438 pounds was transferred to plaintiffs is an improper request for admission under Rule 36 as it requires an admission of a question of law, but to the extent that it may be proper, defendant denies that title to such tungsten powder was transferred to plaintiffs.

Requests (d) and (e). Defendant states that said telegram read as follows:

> "FROM ORDEH-ID-T15578 LASKIN CONTRACTING OFFICER THIS WILL CFM TELECON OF THIS MORNING IN CONNECTION WTH CONTRACT DA-30-069-ORD-462 THE FOLLOWING SALES OF TERMINATION INVENTORY HAVE BEEN SUSPENDED CLN SALES TO METALS AND RESIDUES UR ITEM NO 1-13818 LBS 80 PERCENT TUNGSTEN UR ITEM 2-15248 LBS 94 PERCENT TUNGSTEN SALE TO SURPLEX SALES UR ITEM NO 10-173205 LBS POWDERED TUNGSTEN CARBON REDUCED 99 PERCENT TUNGSTEN PENDING SALE OF 47200 LBS TUNGSTEN POWDER LOCATED AT NIAGARA FALLS THESE SALES ARE SUSPENDED NO DELIVERIES ARE TO BE MADE WHATSOEVER PENDING FURTHER INSTRUCTIONS FROM NEW YORK ORDNANCE DISTRICT YOU ARE INSTRUCTED TO ADVISE ALL BIDDERS INVOLVED CONFIRM IMMEDIATELY."

Defendant admits the said telegram directed it not to make deliveries pending further instructions from the New

York Ordnance District, but denies that a sale was made by defendant to the plaintiffs.

92 Request (f). Defendant repeats the denial made in its response to requests (d) and (e) that a sale was made to the plaintiffs but admits that it received a letter from the New York Ordnance District, Department of the Army, over the signature of Henry C. Laskin, Contracting Officer, dated March 5, 1954, reading as follows:

> "This is to advise that the bid of $226,570.70 by the Surplex Sales, for the termination inventory submitted by your company on Termination Inventory Schedule B, Purchase Parts and Raw Material, DD Form 543 and Schedule C, Work in Process, DD Form 544, has been accepted.
>
> "A disposal credit of $226,570.70 will be deducted from your final settlement proposal claim."

Defendant denies that this letter affected title to the tungsten powder involved and states that the contracting officer and no authority to write such letter.

Request (g). Defendant admits that at the time indicated, it had possession of the tungsten powder in question but denies having had title thereto.

Request (h). Defendant admits that the instrument in writing set forth in response to request (f) purported to relate to the transfer of title of the tungsten powder, contends that the letter was unauthorized, asserts that whether or not such instrument constituted an "other instrument executed by or on behalf of" a government agency purporting to transfer title or an "other interest in property" which the United States had or could or might have had in the property in question is an improper request for admission under Rule 36 as it seeks to require an admission of a question of law, but to the extent that

93 such request may be proper, defendant denies that it transferred title or an "other interest in property" to the property in question to the plaintiffs.

Requests (i) and (j). Defendant cannot admit or deny the matters set forth in requests (i) and (j) because it does not have knowledge or information as to the facts upon which it can base a judgment thereon.

Request (k). Defendant admits that possession of 438 pounds of tungsten powder was delivered to the plaintiffs by the defendant prior to a request or demand for the transfer or possession of the tungsten powder by the defendant to the United States Government, but denies the rest of the matter set forth in request (k).

Request (l). Defendant cannot admit or deny the matter set forth in request (l) because it does not have knowledge or information as to the facts upon which it can base a judgment thereon.

Request (m). Defendant admits that the contracting officer did not make reservation of title or possession by written communication during the time indicated other than that set forth in the prime contract DA-30-069-ORD-462 between the Government and the defendant.

Request (n). Defendant denies the matter stated in request (n).

94 Request (o). Defendant denies the matter stated in request (o).

Request (p). Defendant admits the matter stated in request (p).

Request (q). Defendant admits the matter stated in request (q) other than that the bids or abstract thereof were submitted on behalf of the plaintiffs which it denies.

Request (r). Defendant admits that the bid of the plaintiffs related to the title of the tungsten powder in question but denies that it affected such title.

Request (s). The document forwarded by the Ordnance Corps on March 5, 1954 is set forth in defendant's response to request (f). Defendant denies that such document directed the defendant to notify the plaintiffs that they were

awarded the tungsten powder in question, denies that the document affects the title of said tungsten powder, but admits it relates thereto.

Request (t). Defendant denies the matter set forth in request (t).

Request (u). Defendant admits the matter set forth in request (u).

Request (v). Defendant admits that the contract between the United States Government and the defendant known as Contract DA-30-069-ORD-462 was classified and further admits that the defendant has refused to supply the plaintiffs with information concerning the same or to forward a copy of the contract to the plaintiffs. De-
95 fendant has no knowledge or information as to the facts upon which it can admit or deny whether the General Services Administration or the Department of the Army, the Ordnance Corps, similarly refused to supply such information to the plaintiffs.

Request (w). Defendant denies that a contract exists between defendant and plaintiffs relating to the tungsten powder in question but admits that plaintiffs contend they have one. Whether or not the plaintiffs have waived or released any rights, if any, they may have relating to the tungsten powder in question is an improper request for admission under Rule 36 as it seeks to require an admission of a question of law.

Request (x). Defendant admits the matter stated in request (x).

Request (y). Defendant admits that in October 1953 it sold 52,604 pounds of cobalt powder which was part of the termination inventory under the same terminated government contract under which defendant had acquired the tungsten powder in question, but states it has no knowledge or information as to what plaintiffs mean by the

phrase "so-called strategic material" and denies that said cobalt was required by the Government for stockpiling as was the tungsten powder in question.

Request (z). Defendant denies the matter stated in request (z).

96 Except as specifically admitted or denied herein, defendant denies all statements or allegations made in the plaintiffs' further request for admissions.

R. M. Briney
Vice-President of
Haynes Stellite Company
A Division of
Union Carbide and Carbon Corporation

Jurat

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THEIR FAVOR ON THE QUESTION OF LIABILITY (ALSO OFFERED IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT HERETOFORE FILED HEREIN)

(Filed Aug. 13, 1956)

The plaintiffs Rose Finsky, Avrum Andalman, Joseph M. Andalman, Lee S. Andalman, Yetta S. Andalman and Maxwell N. Andalman, Co-partners, doing business under the name of Surplex Sales, a Co-partnership, by their attorneys, Irwin S. Baskes and Elmer Gertz, hereby move this court to enter summary judgment for the plaintiffs and against the defendant on the question of liability alone, and to reserve the question of damages for subsequent proceedings, all in accordance with Rule 56 of the Federal Rules of Civil Procedure; and in support thereof the plaintiffs hereby refer the court to the pleadings herein, to the plaintiffs' original Request for Admissions (to which de-

fendant has filed no response), to the plaintiffs' Fur-
106 ther Request for Admissions heretofore served on de-
fendant, to the defendant's response to the Further Request for Admissions, to the Affidavits heretofore filed by the defendant in support of its motion for summary judgment, to the Depositions of G. H. Shelton, R. W. Williams, and C. J. Dalton, heretofore filed herein, to the exhibits in connection with the said Depositions heretofore filed herein, and to the attached Affidavits in support hereof, all of which show (a) that the plaintiffs are entitled to a judgment on the question of liability as a matter of law and (b) that the defendant's motion for summary judgment must be denied as a matter of law.

Dated at Chicago, Illinois, this 13th day of August, 1956.

Irwin S. Baskes and Elmer Gertz
Attorneys for Plaintiffs.

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AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Maxwell N. Andalman, being first duly sworn, on oath deposes and says that:

1. He resides at 7020 South Jeffrey Avenue, Chicago 49, Illinois, and is one of the plaintiffs herein, and the agent of the other plaintiffs, as a co-partner with them, doing business under the name and style of Surplex Sales. He read, signed and knows the contents of the plaintiffs' complaint and the amendment thereto, and personally knows the same, and each allegation thereof, to be
108 true, except as to those matters and things therein alleged to be on information and belief, and, as to those matters and things, he verily believes them to be true.

2. Under date of February 11, 1954, the Haynes Stellite Co. Division of the Union Carbide & Carbon Corp., from its offices in Kokomo, Indiana, wrote to Surplex Sales, inviting and soliciting Surplex Sales to bid in writing for the tungsten powder and other materials involved herein. A true and correct copy of said writing is attached to the complaint herein as Exhibit "1", and is by express reference made a part of this affidavit. The plaintiffs assumed by reason of said letter that if their bids were accepted by the defendant, then the plaintiffs had the unqualified and indefeasible right to obtain the materials covered by the said bids, subject only to the payment therefor.

3. In reliance upon the said letter of February 11, 1954, and with no knowledge of the contents of any contract between the defendant and the Government of the United States, nor of the terms thereof, nor of any action or inaction with respect thereto by anyone, which could or did affect the title to the said merchandise, the plaintiffs made written bids for the said tungsten powder and other merchandise. A copy of said bids is set forth as Exhibit "3" of the complaint herein, and is incorporated in this affidavit with the same force and effect as if set forth herein in full.

4. Plaintiffs submitted to the defendant their bids for the said various items within the time specified in
109 the letter from defendant, that is to say by, to-wit, 5:00 P.M., February 23, 1954.

5. On, to-wit, Saturday, the 6th day of March, 1954, this affiant and Joseph M. Andalman met with Mr. G. H. Shelton, the Office Manager of the Haynes Stellite Division of the defendant, at its plant in Kokomo, Indiana. This affiant there said to Mr. Shelton: "I want you to know, Mr. Shelton, that we appreciate your putting yourself out to meet us today; We are greatly in need of a quantity of the tungsten powder as prospective customers are

clamoring for small quantities to be tested by their laboratories and upon these tests may depend closing of sales." Shelton said "take a wooden keg of 438# and leave a check on account, enough to cover." Whereupon Mr. Shelton led affiant and J. M. Andalman to the building containing the tungsten powder here in question and delivered to affiant and said J. M. Andalman said keg of tungsten powder. We then returned to Mr. Shelton's office where plaintiffs gave to said Shelton their check on account as aforesaid in the sum of Seven Hundred One and Sixty Eight Cents ($701.68). Affiant then stated to said Shelton

"you can understand that the moment we heard from
110 you on February 23rd or 24th, that we were high in
the bid, we began an intensive campaign to develop outlets for this tungsten powder. We knew that we would need to develop finances, and in order to properly do this, it was necessary to explore the market. We have practically shut down all our business to concentrate on this. When can we get the material delivered?" Shelton replied: "You give me a certified check right now for the $225,000, or whatever is due, and you can back up your trucks and take it out now." This affiant then said: "You know, Mr. Shelton, your concern and our concern have done business before, when we bought the cobalt from you last October, which involved about $85,000, you will recall that we paid you about one-half the money down, and we took out about one-third or more of the cobalt pwder on an arrangement whereby within two or three weeks we would pay you the balance and pick up the rest of the powder. I anticipate that we have established our credit with you, and that we can get some time on payment." Shelton said: "I want to go along with you, but you cannot expect us to wait a great length of time." This affiant said: "I do not expect you to wait a great length of time. I want you to give us a week or so and we will bring in

around $115,000 and receive at your hands one-third of the merchandise; but I want you to give us three weeks thereafter to pay the balance." Shelton said: "That will be satisfactory." Then affiant said: "In order to develop the finances, we have to know when we will get the written award." Shelton replied: "I am ready to give you the written award now." Thereupon Shelton sat down and
111 personally typed out the award, more fully set forth hereinafter and in paragraph 10 of the amendment to the complaint.

6. As hereinabove set forth, on, to wit, the 6th day of March, 1954, the defendant, at Kokomo, Indiana, delivered to this affiant for the plaintiffs a communication on the letterhead of the defendant, Haynes Stellite Co. Division, reading as follows:

"March 6, 1954

Surplex Sales
2409 S. La Salle Street
Chicago, Illinois

Gentlemen:

This is to advise that you have been awarded approximately

173205 lbs. powdered tungsten, carbon reduced, 99% tungsten
10268 lbs. lamp black
40 grinding wheels

This award was granted in accordance with your bid of February 23, 1954.

Yours truly,
(Signed) G. H. Shelton
G. H. Shelton"

7. By reason of the said communication, and by reason of the laws of the State of Indiana, the plaintiffs
112 assumed and relied upon the express and implied rep-

resentations and warranties of the defendant that it had the right at that time to sell the said tungsten powder and other materials to the plaintiffs, that it had good title thereto, and that the plaintiffs would have quiet enjoyment of the possession and use thereof.

8. As hereinabove set forth, on, to-wit, the 6th day of March, 1954, the defendant, at its plant in Kokomo, Indiana, concurrently with the delivery of the said award to plaintiffs, made a partial delivery to the plaintiffs of one (1) barrel of said tungsten powder purchased by plaintiffs from the defendant. Plaintiffs paid defendant the sum of $701.68 on account of the total amount due to the defendant for the said tungsten powder and other materials.

9. The plaintiffs, in reliance upon the arrangements thus made, and the representations and warranties of the defendant, went to great expense and trouble and committed themselves for undertakings of various kinds to certain third parties, including finance houses, prospective purchasers of the tungsten powder and others.

10. The plaintiffs have never at any time written, said or done anything to indicate to the defendant that it was released of its contractual obligations to the plaintiffs or that any of the plaintiffs' rights against the defendant have been waived. Plaintiffs have repeatedly written and told defendant that defendant would be held to its obligation under the said contract and sale.

113 11. The plaintiffs have repeatedly requested and urged the defendant to take any and all action required to persuade or compel any Governmental agencies professing to suspend or otherwise interfering with the delivery of said tungsten powder to the plaintiffs to rescind such action and to cease interfering with such delivery, but the defendant failed and refused, and con-

tinues to fail and refuse, to take any such action and has failed and refused and continues to fail and refuse, despite plaintiffs' repeated requests, to appeal from or review such Governmental interference.

12. Although the burden, at all times, was on the defendant to do so, the plaintiffs have attempted to obtain a review and reversal of the said wrongful interference by the Government. Plaintiffs were advised by the Government that the plaintiffs are not privy to the contract between the defendant and the Government and that the plaintiffs cannot appeal from any decisions or rulings by the Government in connection therewith.

13. Prior to the transaction under which they purchased and acquired title to the tungsten powder here in question, the plaintiffs had had previous dealings with the defendant's said Division, Haynes Stellite Co., in connection with other contract termination inventory. That transaction involved upwards of 50,000 pounds of so-called cobalt powder which the plaintiffs now know was also classified as "Strategic Material" which the United States was then stock-piling and for which plaintiffs paid to 114 the defendant the sum of approximately $[illegible]0,000.00.

Affiant has been informed and believes and therefore states the fact to be that the said cobalt powder was acquired by the defendant in connection with and under the terms of the same contract between it and the United States under which it, the defendant, had acquired and accumulated the tungsten powder here in question. Affiant is now informed and believes that the said contract is officially known as "Contract No. DA-30-069-OED-462".

13a. The defendant in its Motion for Summary Judgment has offered, in support thereof, the affidavit of one Henry C. Laskin, the principal Contracting Officer of the New York Ordnance District of the United States Army Ordnance Corps. Said Henry C. Laskin is the same officer

who was charged with representing the United States in connection with the above numbered contract, is the same government representative who directed in writing the defendant to offer for sale the said tungsten powder and also the said cobalt powder, and is the same person who, in writing, directed the termination of said contract for government convenience on March 11, 1953.

13b. In the purchase and acquisition of the said tungsten powder from the defendant, the plaintiffs were instructed by defendant to execute and pursue the identical procedure that they had followed in bidding for and acquiring title to the said cobalt powder; and in bidding for and acquiring the said tungsten powder, the plaintiffs did so rely and depend upon and follow the instructions of the defendant.

115 14. The plaintiffs never had any knowledge of the existence of or provisions of the so-called Emergency Procurement Regulation No. 1 of the General Services Administration (which regulation is the pretext upon which the defendant relies for violating its contract with the plaintiffs) until after the plaintiffs' bid had been approved by the Department of the Army and by the defendant and until after the said award had been delivered by the defendant to the plaintiffs and the sale consummated and partial payment and partial delivery had been made as aforestated. The said regulation was never published in the Federal Register, and the plaintiffs never had any actual or constructive knowledge or notices thereof.

15. Under date of June 3, 1954, Surplex Sales wrote to the General Services Administration, reciting the facts of the situation and asking for a hearing. The letter said, among other things:

". . . Our position is daily being jeopardized because of market conditions and the damages are increasing . . . We would not want this statement to be

taken as any waiver of our claim to the merchandise, nor as any release of the contract for its full legal obligation and consequences to us."

16. Under date of June 22, 1954, this affiant again wrote to Haynes Stellite Co., soliciting cooperation to procure release of "our merchandise." On the same day this affiant wrote again to the General Counsel of the General Services Administration, asking for word of any rul-
116 ing, and reminding the General Counsel that at a conference theretofore held he had been unable to advise this affiant as to how the General Services Administration Board of Review obtains jurisdiction for a ruling. On the same day this affiant wrote again to the legal counsel for defendant reminding him again of his failure to respond to communications and his lack of cooperation in arranging Governmental conferences.

17. Under date of June 23, 1954, this affiant again wrote to the defendant's legal counsel asking for copies of Government's termination notice, copies of directions from contracting officer, authorization to sell merchandise, etc. The letter said, among other things:

> "The law is clear that when we complied with the terms . . . of the letter inviting us to bid, and the ads . . . the title to the merchandise passed to our client subject to . . . paying for same . . . Being our property, there is only one way for the Government to lawfully acquire it from us, *i.e.* by due process of law."

In the same letter, this affiant asked for evidence that defendant was making an effort to get the Government to release the merchandise.

18. To this affiant's letter of June 22, 1954, the defendant's legal counsel replied to this affiant under date of June 24, 1954, saying among other things:

> "We do not understand, however, that a final de-

cision to retain the powdered tungsten has as yet been made by the Government."

The letter, also, advised this affiant that in connection with the approval of the bids for the earlier cobalt and the instant tungsten powder, the contracting officer was Henry C. Laskin. The letter, also, said:

117 "We are unable to advise you with regard to the methods followed by the New York Ordnance in reviewing bids submitted to us for termination inventory under our terminated contract. We assume, however, that the procedures followed by the Ordnance are those contained in the Armed Services Procurement regulations."

19. Under date of June 25, 1954, this affiant again wrote to the defendant:

"We feel quite certain that you will not permit your company to jeopardize itself by turning over the merchandise in question to anyone except . . . Surplex . . ."

The letter again advised the defendant that it would be held accountable. On the same day this affiant wrote to the same effect to defendant's legal counsel.

20. Under date of July 1, 1954, defendant's legal counsel wrote to this affiant that the contract between the defendant and the Government is "classified", so that no copy of it may be given out. The letter said, among other things:

"You may be sure that as soon as we receive instructions from the United States Government as to the disposition of the tungsten powder, I shall immediately advise you."

21. Under date of August 30, 1954, this affiant again wrote to the General Services Administration, again stating the position of the plaintiffs as to the validity of the sale to them of the tungsten powder and asking the General Services Administration to rescind "its unlawful order

directing them (the defendant) not to deliver . . ." The letter again asked about an appeal, without waiving any rights against the defendant.

22. Subsequently, on to-wit, September 21, 1954, the General Services Administration wrote the plaintiffs that it had not given any instructions of any kind to the De-
partment of the Army with respect to the said tungsten
118 powder, and that what it had written or told the De-
partment of the Army was only "advisory, and not in any sense a direction or instruction that had to be followed."

23. Under date of September 24, 1954, this affiant again wrote to the defendant's legal counsel, telling of how the plaintiffs had been shunted back and forth between the General Services Administration and the Department of the Army and of the plaintiffs' carrying a burden which should be borne by the defendant. The letter again advised the defendant that it is up to it to take action to sustain its contract with plaintiffs, for which the plaintiffs will hold the defendant liable. This affiant again asked for a copy of the defendant's contract with the Government.

24. Under date of October 1, 1954, the defendant's legal counsel wrote to this affiant, saying that defendant still could not give a copy of the contract to the plaintiffs as it is a "classified document." The letter went on to say:

> . . . "I now inform you that Haynes . . . has just received instructions from the New York Ordnance District, directing it to ship the tungsten powder to the Government. Please be advised that we consider these instructions to be binding upon us and that we are currently making delivery."

25. Thereupon Surplex Sales wrote to the defendant, under date of October 5, 1954, as follows:

> "Please remember, if you deal with this merchandise in any fashion other than delivering same to us, you

will do so at your distinct peril . . . Your company will be held strictly accountable."

26. The plaintiffs thereafter continued their efforts to appeal the Governmental decision and action; but
119 under date of October 28, 1954, this affiant was advised by the Department of the Army.

"Since no privity of contract exists between your client (Surplex Sales) and the Department of the Army, there is no procedure which would permit a direct appeal being filed with the military establishment."

27. Affiant is competent to testify as to all of the matters and things hereinabove set forth. The statements are upon his personal knowledge of facts, conversations, documents and writings competent to be used in the trial of this cause, and if affiant is called as a witness on the trial of the above case, he is competent and will testify to the said facts. His knowledge of the facts therein set forth as being on information and belief came to him in conversations with representatives, and agents of the defendant and of the United States Government.

Maxwell N. Andalman

Jurat

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AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Joseph M. Andalman, being first duly sworn, on oath deposes and says:

1. He resides at 7829 South Saginaw, Chicago, Illinois, and is one of the plaintiffs herein and the agent of the other plaintiffs, as a co-partner with them, doing business

under the name and style of Surplex Sales. He has read and knows the contents of the plaintiffs' complaint and the amendment thereto, and personally knows the same, and each allegation thereof, to be true, except as to those matters and things therein alleged to be on information and belief, and, as to those matters and things, he verily believes them to be true. He has read and knows the
121 contents of the affidavit of Maxwell N. Andalman in support of plaintiffs' motion for summary judgment and in opposition to defendant's motion for summary judgment, and knows the same, and each averment thereof, to be true. Either he or Maxwell N. Andalman dictated and signed each communication sent out by Surplex Sales in connection with the matter involved herein, and all communications received by or in behalf of Surplex Sales were directed to the atttention of and read by, either this affiant or Maxwell N. Andalman.

2. Neither he nor, as he is informed and believes, any one else connected with Surplex Sales ever saw either an original or a copy of the agreement between the defendant or its division, Haynes Stellite Co., and the United States of America, or any instrumentality or agency thereof until long after this suit was started and not until July 1956, at which time said contract was exhibited under Order of this Court, to plaintiff's attorneys, Elmer Gertz and I. Baskes. Not until after the award and sale to plaintiffs, hereinafter mentioned, did defendant supply plaintiffs
122 with any part of said agreement. Under date of June 18, 1954, defendant supplied plaintiffs with a purported copy of section 22 of its said contract with the Government, relating to "termination for convenience of the Government."

2a. Prior to the said sale and award, neither he nor any one else connected with Surplex Sales had any knowl-

edge of anything done or omitted to be done by anyone connected with or relating to said contract or the sale of said tungsten powder. Plaintiffs were assured by defendant at all times that defendant and all Governmental agencies had performed any and all requirements of said
123 contract and law and that plaintiffs could, therefore, rely upon defendant. By reason thereof, plaintiffs did rely upon the representations and warranties of defendant, express or implied, that it had power and authority to sell and give good title and to deliver possession, title and quiet enjoyment to and of said tungsten powder to plaintiffs.

3. After Surplex Sales received the letter of February 11, 1954, from Haynes Stellite Co. Division of the defendant (Exhibit "1" of the complaint herein), Surplex Sales wrote to defendant, bidding, as requested by defendant, for the tungsten powder and other materials (Exhibit "3") of the said bid in reliance upon the invitation and solicitation of the defendant (Exhibit "1" of complaint.) It also made such bids by telegram and long distance telephone within the specified time limits.

4. On March 4, 1954, he personally called Mr. Van Heest of the New York Ordnance District of the Department of the Army to inquire with respect to the bid theretofore made by Surplex Sales. This call was made at the suggestion of the defendant. He was told by Mr. Van Heest that the Board of Awards would meet the next day, and that he could call them. He called the next day and was told that the bids of Surplex Sales on the tungsten powder and certain other materials were unconditionally approved by the Army Board of Awards. He then, in Mr. Van Heest's presence over long distance phone, talked with Mr. G. H. Shelton, the office manager of the Haynes Stellite Co., Division of the defendant, and made arrangements to consummate the purchase of the tungsten powder and

124 other materials at Kokomo, Indiana on March 6, 1954.

5. On March 6, 1954, he and Maxwell N. Andalman met with G. H. Shelton, the office manager of Haynes Stellite Co., at Kokomo, Indiana, and the conversation and action set forth in the affidavit of Maxwell N. Andalman with respect thereto occurred as therein set forth.

6. On March 10, 1954, after being advised for the first time by the defendant of the suspension of the sales, Surplex Sales wrote to the New York Ordnance District, in which letter Surplex Sales recited in detail the defendant's solicitation of it to bid, the bids made by it in reliance upon such solicitation, and all efforts made by Surplex Sales to market the tungsten powder prior to the suspension order. The said letter said, among other things, the following:

> "Thousands of dollars have been spent in long distance calls and other expenses and a number of commitments have been made. Some purchase orders are on hand. Many contacts have developed to the point where purchase orders for large quantities are imminent. We have virtually suspended all our other business operations since Friday last. By this we mean we employed our efforts on Saturday and Sunday as well because of the large finances involved. It is our legal position that no authority exists to stop the deliveries or to nullify our contract. If there is any hearing to be had in this matter, we trust that we will be advised and will be given an opportunity to appear and be heard."

125 The letter also indicated the intent of Surplex Sales to appeal any adverse decision.

7. On March 11, 1954, he again called Mr. Van Heest of the New York Ordnance District by long distance telephone. Mr. Van Heest not being in, he talked with Mr. Lundberg, who referred him to Captain Gray, the Prop-

erty Disposal Officer in the Pentagon. Thereupon, he talked with Captain Gray by long distance telephone, and Captain Gray said to him that he was aware of all the legal complications, and that when the matter came up, prior to the suspension order, they investigated with the Legal Department, and they are fully aware that a breach of contract has been made by Haynes Stellite Co. if the sale is abrogated. This affiant advised Captain Gray that he would like to be advised of all action that might be taken so that the necessary appeals might be had.

8. On March 13, 1954, he talked by long distance telephone with Mr. Kelly of the Legal Department of the New York Ordnance District, and was told by him that all of the plaintiffs' contact should be with Haynes Stellite Co. direct.

9. On March 17, 1954, Surplex Sales again wrote to Haynes Stellite Co., reviewing the situation and again telling of the lengths to which Surplex Sales had gone in exploiting the marketability of the tungsten powder. The letter said, among other things: "It then follows without even saying so that if we fail to receive delivery we
126 would be obliged to hold Haynes Stellite Co."

10. Under date of March 18, 1954, the New York Ordnance District wrote to Surplex Sales: "After careful consideration by this office full instructions in connection with the disposition of the aforesaid tungsten powder are being forwarded to Haynes Stellite who will undoubtedly communicate with you on this matter."

11. Under date of March 19, 1954, Surplex Sales wrote to Haynes Stellite Co. again, which letter said, among other things, the following:

> "We are in a dilemma ourselves since we have made commitments which could result in lawsuits against us. Needless to say we are extremely anxious to avoid lawsuits for ourselves as well as your concern. We

therefore expect that you will work out your peace with the Government to the end that we may obtain delivery of the material promptly."

12. On March 29, 1954, Surplex Sales again wrote to Haynes Stellite Co., among other things, as follows:

"To now we have heard nothing from you in this matter. Obviously some decision must be made. We have a valid subsisting agreement with you and expect you to honor same by the delivery of the material. We continue to be hopeful that the relations between us are and will remain cordial. The matter is in your hands. Should there be no additional progress during this week we will be obliged to assume you do not expect voluntarily to fulfill the contract and will act accordingly. . . . So many contacts have been made and so much work done that only the fulfillment of our own commitments can satisfy us and cement our relationship with the customers already contacted."

127 13. Other letters were thereafter sent by Surplex Sales to the defendant and to governmental agencies, urging reconsideration of the suspension order, a review of the situation, appeals and the honoring of the commitments to the plaintiffs.

14. On April 14, 1954, Mr. G. H. Shelton, the Office Manager of Haynes Stellite Co., called this affiant by long distance telephone; and in the course of this conversation this affiant called Mr. Shelton's attention to the fact that the representatives of Surplex Sales were not prepared to go into any conference which presumed that anyone connected with Surplex Sales had knowledge that the sale of the tungsten powder was in violation of any existing government regulations. Mr. Shelton then admitted that no one connected with Surplex Sales had any such prior knowledge, but said that after the suspension order he had

relayed the information. This affiant thereupon said to him: "This, of course, has no effect on our contract with Haynes Stellite."

15. There followed other communications between Surplex Sales, its attorneys and representatives, and the defendant, and various governmental agencies, in which Surplex Sales continued the effort to obtain the balance of the tungsten powder.

16. On July 15, 1954, Surplex Sales again wrote to General Services Administration, which said letter is as follows:

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"July 15, 1954

General Services Administration
18th & F Streets
Washington, D. C.
Attention: Max Elliott, General Counsel
In re: 173,205# Tungsten Powder on bid offering by Haynes-Stellite Company, opened February 23, 1954.

Gentlemen:

Since Mr. Maxwell N. Andalman of Andalman & Andalman, last wrote you, neither he nor we have heard anything from you.

We assume that the entire matter is still under advisement and that we, as an interested party, will be advised if and when any decision is made.

As we have on each occasion stated, it is our wish to appeal from any unfavorable decision which is made. Any such unfavorable desision we wish to have reviewed in manner provided by law or by any regulations covering the subject.

Yours very truly,
Surplex Sales
By J. M. Andalman

JMA:tm

cc: Mr. R. H. Gregory,
Haynes-Stellite
New York, New York
Mr. G. J. Shelton,
Haynes-Stellite
Kokomo, Indiana"

17. On July 22, 1954, Surplex Sales again wrote to Haynes Stellite Co., reminding it of the several letters sent to it and its attorney, and again urging it "to conform to your contract by delivery to us".

18. On, to-wit, August 4, 1954, the General Services Administration of the Government, acting through its General Counsel, wrote the plaintiffs that the General Services Administration "take no position with respect to this matter, insofar as the rights or obligations between you and Haynes Stellite Company are concerned."

129 19. Subsequently, on to-wit, September 21, 1954, the General Services Administration wrote the plaintiffs that it had not given any instructions of any kind to the Department of the Army with respect to the said tungsten powder, and that what it had written or told the Department of the Army was only "advisory, and not in any sense a direction or instruction that had to be followed."

20. The plaintiffs never had any knowledge of the existence of or provision of the so-called Emergency Procurement Regulation No. 1 of the General Services Administration (which regulation is the pretext upon which the defendant relies for violating its contract with the plaintiffs) until after the plaintiffs' bid had been approved by the Department of the Army and by the defendant and until after the award had been delivered by the defendant to the plaintiffs and the sale consummated and partial payment and partial delivery had been made. The said regulation was never published in the Federal Register,

and the plaintiffs never had any actual or constructive knowledge or notices thereof.

21. The plaintiffs have never at any time released the defendant from the contractual obligations to the plaintiffs, and have never waived any of their rights against the defendant, or in and to the said tungsten powder and other materials, and have always maintained and asserted that all right and title in and to said tungsten powder and other materials was and is in plaintiffs.

130 22. The plaintiffs have repeatedly requested and urged the defendant to take any and all action required to persuade or compel any governmental agencies professing to suspend or otherwise interfering with the delivery of said tungsten powder to the plaintiffs to rescind such action and to cease interfering with such delivery, but the defendant failed and refused, and continues to fail and refuse, to take any such action and has failed and refused and continues to fail and refuse, despite plaintiffs' repeated requests, to appeal from or review such Governmental interference.

23. Prior to the transaction under which they purchased and acquired title to the tungsten powder here in question, the plaintiffs had had previous dealings with the defendant's said Division, Haynes Stellite Co., in connection with other contract termination inventory. That transaction involved upwards of 50,000 pounds of so-called cobalt powder which the plaintiffs now know was also classified as "Strategic Material" which the United States was then stock-piling and for which plaintiffs paid to the defendant the sum of approximately $80,000.00. Affiant has been informed and believes and therefore states the fact to be that the said cobalt powder was acquired by the defendant in connection with and under the terms of the same contract between it and the United States under

which it, the defendant, had acquired and accumulated the tungsten powder here in question. Affiant is now informed and believes that the said contract is officially known as "Contract No. DA-30-069-ORD-462".

131 24. The defendant in its Motion for Summary Judgment has offered, in support thereof, the affidavit of one Henry C. Laskin, the principal Contracting Officer of the New York Ordnance District of the United States Army Ordnance Corps. Said Henry C. Laskin is the same officer who was charged with representing the United States in connection with the above numbered contract, is the same government representative who directed in writing the defendant to offer for sale the said tungsten powder and also the said cobalt powder, and is the same person who, in writing, directed the termination of said contract for government convenience on March 11, 1953.

25. In the purchase and acquisition of the said tungsten powder from the defendant, the plaintiffs were instructed by defendant to execute and pursue the identical procedure that they had followed in bidding for and acquiring title to the said cobalt powder; and in bidding for and acquiring the said tungsten powder, the plaintiffs did so rely and depend upon and follow the instructions of the defendant.

26. Affiant is competent to testify as to all of the matters and things hereinabove set forth. The statements made are upon his personal knowledge of facts, conversations, documents and writings competent to be used in the trial of this cause, and if affiant is called as a witness on the trial of the above case, he is competent and will testify to the said facts. His knowledge of the facts therein

132 set forth as being on information and belief came to him in conversations with representatives and agents of the defendant and of the United States Government.

Joseph M. Andalman

Jurat

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NOTICE

To: Robert Tieken
United States Court House
Clark and Adams Streets
Chicago, Illinois
Attorney for defendants.

We hand you herewith, in the above entitled cause, a list of "Requests for Admissions" numbering in all 33 such Requests, on 9 pages double-spaced typewriting.

We request you to make such Admissions in writing within twenty (20) days from the date hereof, or, pursuant to Rule 36 of the "Rules of Civil Procedure for the United States District Courts", furnish us, within such time, a sworn statement specifically denying the facts which you are requested by this Notice to admit, or setting forth in detail reasons why these requested admissions cannot be truthfully made or denied.

Dated at Chicago, Illinois, this 16th day of November, 1955.

Irwin S. Baskes
120 S. LaSalle Street
RAndolph 6-6166
Attorney for Plaintiffs

Received a copy of above Notice, together with the list of "Request for Admissions" referred to in said Notice, on the 17th day of November, 1955.

Robert Tieken
By Richard C. Bleloch
Attorney for defendant

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REQUEST FOR ADMISSIONS ON THE PART OF DEFENDANT.

That:

(1) The defendant, through its Division, Haynes Stellite Company, entered into a contract with the United States Government, through its Ordnance Department, on to-wit, the 13th day of February, 1952, which contract, for the purpose of identification, is known as "Contract No. DA-30-069-ORD-462".

(2) That the defendant, for the purpose and with the intention of using the same in the performance of its obligations under the said contract, acquired certain merchandise and materials, among which was, but not limited to, the following:

Powdered Tungsten, carbon reduced,
99% Tungsten
Lamp Black
Grinding Wheels

(3) That during, to-wit, the month of August, September, October or November, 1953, the defendant re-
169 ceived from the United States Government, through its Ordnance Department, a notice of "termination" of contract "for convenience of the Government" under clause or paragraph numbered "2" (sub-paragraph a) of said "contract #DA-30-069-ORD-462" which was signed by or on behalf of the "contracting officer" of the said Ordnance Department.

(3a) That upon receipt of such "notice of termination" the defendant ceased and stopped all work under the said contract as directed in the said "notice of termination".

(4) That at the time of the receipt by the defendant of said "notice of termination" it had on hand, among

other items of merchandise, but not limited to, the following merchandise:

Approximately 173,205 lbs. Powdered Tungsten, carbon reduced, 99% plus Tungsten Powder
Approximately 10,268 lbs. Lamp Black
Approximately 40 Grinding Wheels

(5) That the items mentioned in "(4)" above, prior to such "notice of termination", had been acquired and were being held, either or both, with the intention and for the purpose, either or both, of being used for performance of its duties and obligations under and by virtue of the aforesaid contract.

(6) That the said "contracting officer" did not, concurrently with the said "notice of termination" nor at any time thereafter, until and including, to-wit, the 24th day of February, 1954, request or direct, orally or in writing, either or both, that the defendant transfer title or deliver the said property mentioned in "(4)", either or both, to the United States Government.

170 (7) That during, to-wit, one of the months mentioned in paragraph "(3)" or during, to-wit, the succeeding months, until and including the month of January, 1954, the defendant received written order or direction from the said "contracting officer" to "use its best efforts to sell" the aforesaid merchandise (see paragraph "(4)") to the highest bidder, such high bid to be subject to the approval of the said "contracting officer" or the said Ordnance Department, the merchandise, among other merchandise, listed in said paragraph "(4)" above.

(8) That the said "contracting officer" was the same person who, on behalf of the United States Government, signed the said contract No. DA 30-069-ORD-462 between the United States of America and the said Haynes Stellite Company, a Division of Union Carbide & Carbon Corporation.

(9) That the Ordnance Department of the United States Government was and is the agency that entered into the said contract mentioned in paragraph "(8)" above.

(10) That during the existence of the contract mentioned in paragraph "(8)", the said "contracting officer" or Ordnance Department, either or both, never did order or direct the defendant to assign to the United States Government or to deliver to it any other merchandise mentioned in paragraph "(4)" above until after, to-wit, the 6th day of March, 1954.

(11) That the said "contracting officer" or the said Ordnance Department did not, prior to, to-wit, the 171 10th day of March, 1954, order, direct or request the defendant to assign title or deliver to the United States of America the merchandise marked in No. "(4)" above.

(12) That the defendant advertised the said merchandise mentioned in No. "(4)", together with other merchandise, for sale to the highest bidder, the high bid to be subject to the approval of the Government, in newspapers and periodicals of secular circulation, including a certain periodical known as the "Waste Trade Journal", requesting sealed bids for the said property up to 5:00 P.M. February 23, 1954; that the defendant wrote a letter on, to-wit, the 11 day of February, 1954, informing the plaintiffs that sealed bids for the merchandise mentioned in No. "(4)" above, among other merchandise, would be received by the defendant until 5:00 P.M. February 23, 1954, the Government reserving the right to reject any or all bids, and stating, to-wit, that "terms of payment would be agreed upon" between the said defendant and the high bidder, whose bid might be approved by the Government.

(13) That the United States Ordnance Department on, to-wit, the 5th day of March, 1954, stated to Joseph M.

Andalman, one of the plaintiffs, that the bid for the merchandise mentioned in above No. "(4)" had been approved and that said merchandise was awarded to the plaintiffs.

(14) That the office manager of the defendant, G. H. Shelton, on, to-wit, March 5, 1954, told the said Joseph M. Andalman that the said merchandise had been awarded to the plaintiffs.

472 (15) That the defendant on, to-wit, March 6, 1954, delivered to the plaintiffs a letter, in writing, notifying the plaintiffs that they had been awarded the merchandise mentioned in No. "(4)" above.

(16) That the defendant, on, to-wit, March 6, 1954, delivered to the plaintiffs one (1) container or barrel of the said Tungsten Powder mentioned in No. "(4)" above, to the plaintiffs, and received from the plaintiffs Seven Hundred One Dollars and Sixty-Eight Cents ($701.68).

(17) That, on the occasion of the delivery of the merchandise as mentioned in No. "(16)" above, the defendant, through its agent and office manager, G. H. Shelton, was told that the plaintiffs required some of this merchandise in order to furnish its prospective customers with samples thereof for testing.

(18) That on the occasion mentioned in No. "(16)" above, arrangements were made between the defendant and the plaintiffs to the effect that the plaintiffs would deliver to the defendant a sum between One Hundred Ten Thousand ($110,000) Dollars and One Hundred Fifteen Thousand ($115,000) Dollars by or on March 11, 1954, and receive at the hands of the defendant one-third (1/3) of the Tungsten Powder mentioned in No. "(4)" above; that the balance of approximately One Hundred Ten Thousand ($110,000) Dollars to One Hundred Fifteen Thousand ($115,000) Dollars would be paid to the defendant by the

plaintiffs within three (3) weeks thereafter, at which time and on which occasion there would be delivered to the plaintiffs the balance of said Tungsten Powder, together with the other items awarded to the plaintiffs.

173 (19) That the defendant received from the "contracting officer" or from the New York Ordnance District, either or both, to-wit, the 10th day of March, 1954, a directive in writing, addressed to its Division, Haynes Stellite Company, as follows, to-wit:

"From ORD EH-ID-TI 5578 Laskin, contracting officer, This will confirm telephone conversation of this morning in connection with contract DA-30-069-ORD-462 the following sales of Termination Inventory have been suspended cln sales to metals and residues your item No. 1-13818 lbs. 80 per cent Tungsten your item 2-15248 lbs. 94 per cent Tungsten sales to Surplex Sales your item No. 3-173205 lbs. Powdered Tungsten carbon reduced 99 per cent Tungsten pending sale of 47200 lbs. Tungsten Powder located at Niagara Falls these sales are suspended no deliveries are to be made whatsoever pending further instructions from New York Ordnance District you are instructed to advise all bidders involved confirm immediately."

(20) That on, to-wit, the 23rd day of August, 1954, the defendant's said subsidiary or division, wrote to the plaintiffs, stating that it was enclosing a check for One Hundred Thirty Dollars and Twenty-five Cents ($130.25) for an alleged "overpayment on to-wit, 438 lbs." of the said Tungsten Powder, and that it enclosed therewith its check No. 28387 drawn on the Union Bank & Trust Company of Kokomo, Indiana, bearing date August 18, 1954, for the

sum of One Hundred Thirty Dollars and Twenty-five Cents ($130.25) to the order of 'Surplex Sales' and signed

"Haynes Stellite Company
Petty Cash Account
(signed) R. E. Budreau
(counter-signed) W. B. Morris"

to which check was attached a voucher reading as follows:

174 "The attached check is in payment of the following: Repayment of over-payment for Tungsten Powder, (signed) Haynes Stellite Company, Division of Union Carbide & Carbon Corporation, Kokomo, Indiana"

and that this had reference to the 438 lbs. of Tungsten Powder, carbon reduced, 99 per cent Tungsten, delivered by the defendant, through its said subsidiary, to the plaintiffs on, to-wit, March 6, 1954.

(21) That demand was made by the plaintiffs upon the defendant for it to perform its contract and deliver said Tungsten Powder; that such demand was made orally on, to-wit, the 10th day of March, 1954; that it was made in writing on, to-wit, the 10th day of March, 1954; that on, to-wit, the 11th day of May, 1954, in meeting with its representatives and agents, that is to say, its attorney, R. H. Gregory, Jr. and its office manager, G. H. Shelton, oral request or demand was made for such performance.

(22) That during, to-wit, the month of July or August, 1954, the defendant did deliver to the plaintiffs all of the items covered by the said award, except the said Tungsten Powder, and that the plaintiffs paid for same.

(23) That it did not advertise the said merchandise for sale and did not advertise for bids for same until after it had received written directive from the "contracting officer", one Laskin, on behalf of the said Ordnance Department, so to do.

(24) That it did receive various bids for the merchandise in question up to 5:00 o'clock P.M., February 23, 1954, including the bid from the plaintiffs.

175 (25) That after receiving such bids it forwarded all the information concerning the same to the said Ordnance Department.

(26) That it received from the United States Ordnance Department on, to-wit, the 5th day of March, 1954, authority or directive in writing to notify the plaintiffs that their bids for the said Tungsten Powder would be accepted and the said merchandise awarded to them.

(27) That on, to-wit, the 10th day of March, 1954, it notified the plaintiffs that they would not deliver the said Tungsten Powder because of a directive by phone and by wire, which on to-wit, said date it received from the said Ordnance Department.

(28) That the plaintiffs, when notified by the defendant on to-wit, the 10th day of March, 1954, to the effect that the Ordnance Department directed it, the defendant, to suspend delivery of the said Tungsten Powder to the plaintiffs, then and there told the defendant, through its agent and office manager, G. H. Shelton, that the contract between the defendant and the plaintiffs was complete and consummated, and that plaintiffs would expect and would demand delivery upon payment under the terms arranged for on to-wit, March 6, 1954; that the title to such merchandise had passed on the said to-wit, the 6th day of March, 1954.

(29) That on to-wit, the 10th day of March, 1954, the reasonable market value of the said Tungsten Powder on the open market in the State of Indiana was $4.95 per lb. f.o.b. Kokomo, Indiana.

176 (30) That the said market value was applicable to and over the entire United States of America, f.o.b. point of shipment.

(31) That the reasonable market value of the said Tungsten Powder on the said date, to-wit, March 10, 1954, f.o.b. Kokomo, Indiana, was not less than $3.75 per lb.

(32) That the reasonable market value of the said Tungsten Powder on the said, to-wit March 10, 1954, at any and all points in the United States of America, f.o.b. shipping point, was not less than $3.75 per lb.

(33) That it has on hand in its possession and under its control, the Tungsten Powder mentioned in Request No. "(4)" above.

Pursuant to Notice served upon counsel of record for defendant, it, the defendant, is required to file with and serve upon the plaintiffs sworn statement specifically denying the truth of any of the foregoing thirty-two (33) such Requests, in accordance with and pursuant to Rule 36; also, with the consequences provided for in such Rule in case of failure to answer and failure to specifically deny.

Take due notice hereof and govern yourself accordingly.

Dated at Chicago, Illinois, this 17th day of November, 1955.

Rose Finsky, et al., etc.
Plaintiffs,
By *Irwin S. Baskes*
Attorney for Plaintiffs

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NOTICE

(Filed Aug. 13, 1956)

To: Robert Tieken
Attorney for Defendant
United States Courthouse
Clark and Adams Streets
Chicago, Illinois

We herewith serve upon you copies of the plaintiffs' Further Request for Admissions, in accordance with Rule

36 of the Federal Rules of Civil Procedure.

Dated at Chicago, Illinois, this 16th day of March, 1956.

Irwin S. Baskes
Elmer Gertz
Attorneys for Plaintiffs

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FURTHER REQUEST FOR ADMISSIONS

(Filed Aug. 13, 1956)

Served with foregoing Notice.

The plaintiffs, Rose Finsky, Avrum Andalman, Joseph M. Andalman, Lee S. Andalman, Yetta S. Andalman, and Maxwell N. Andalman, Co-partners, doing business under the name of Surplex Sales, a Co-partnership, request the defendant, Union Carbide & Carbon Corp. a New York Corporation, Owners and Operators of Division thereof known as Haynes Stellite Co., within twenty (20) days after the service of this request, to make the following admissions for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the time of trial; all in accordance with Rule 36 of the Federal Rules of Civil Procedure:

179 That:

(a) On the 6th day of March, 1954, when the defendant handed to plaintiffs its "written award" (see copy of said award attached to complaint filed herein) it, the defendant, at that moment, had both title and possession of the 173,205 pounds of the tungsten powder in question.

(b) When the defendant delivered 438 pounds of the said tungsten powder to the plaintiffs, concurrently with the delivery to them of the "written award", it, the defendant, had both title and possession thereof.

(c) When the defendant put the plaintiffs in possession

of said 438 pounds, it, the defendant, transferred to the plaintiffs both title and possession thereto.

(d) The instructions and telegram from the contracting officer, Laskin, received by the defendant on, to-wit, the 10th day of March, 1954, did not in fact abrogate the sale by the defendant to the plaintiffs.

(e) The said telegram merely attempted to "suspend" deliveries "pending further instructions".

(f) The approval of the Ordnance Corps of the sale to the plaintiffs and of their bid, which approval was forwarded to the defendant on March 5, 1954, was in writing and signed by the Ordnance Corps or by the contracting officer Laskin for and on its behalf, and related to and affected the title to the tungsten powder involved.

180 (g) At the time of the "approval" mentioned in (f), the title and possession of the tungsten powder in question was in the defendant.

(h) The instrument in writing, which constituted the said March 5, 1954 approval, related to the transfer of title and is and constitutes an "other instrument executed by or on behalf of" a "Government Agency purporting to transfer title or" an "other interest in property" which the United States had or could or might have had in the property in question, to-wit, the powdered tungsten here involved.

(i) The plaintiff bonafidedly bid for the said tungsten powder and such bona fidedness continued through the time and delivery to plaintiffs of the said written award.

(j) The bona fides of the plaintiffs existed and continues to exist at all stages involved in the subject matter of the litigation, to the date hereof.

(k) The 438 pounds of tungsten powder was delivered to the plaintiffs by the defendant with the said written award, prior to any request or demand for the transfer of

either title or possession of the said tungsten powder by defendant to the United States Government.

(l) The plaintiffs were never at any time prior to March 10, 1954, apprised of or in knowledge of the fact that there was any failure or alleged failure, or default or omis-
181 sion, on the part of the contracting officer in respect to the said tungsten powder.

(m) The Government contracting officer did not, in his "Notice in Writing of Termination" dated, to-wit, March 11, 1953, nor in other instrument in writing, delivered or sent by him to the defendant at any time after said March 11, 1953, up to and including March 9, 1954, make any reservation of title or possession.

(n) The only reservation in any writing delivered or sent by the contracting officer to the defendant, between, to-wit, March 11, 1953 and March 9, 1954, pertained and related to the matter of the Government approving or rejecting the bid that might be made for the said tungsten in question here, and did not relate to the matter of "approval or rejection" of the sale.

(o) The only authority reserved, in writing, by the contracting officer during the said period, was to accept or reject a bid, and no authority was reserved to approve or disapprove the sale in question.

(p) The bids of the plaintiffs and all other bidders, placed in the hands of the defendant, pursuant to its invitation to the public, were delivered to the contracting officer or to a Board or Committee of the Ordnance Corps, affiliated and acting with the said contracting officer, or an abstract of such bids was submitted to him or them, on or after February 23, 1954 and prior to March 5, 1954, and these were in writing and related to the question of
182 title and possession of the tungsten powder in question.

(q) The submission of the bid of the plaintiffs, or an abstract thereof, by the defendant to the said contracting officer, the said Board or Committee, was so submitted on behalf of the plaintiffs, and was in writing.

(r) The document or documents referred to in (q) so submitted to the contracting officer, etc., was a document affecting and relating to the title of the tungsten powder in question.

(s) The document forwarded by the Ordnance Corps on March 5, 1954 (see (f) and (r)) directed the defendant to notify the plaintiffs that they were awarded the tungsten powder in question, and such document relates to and affects the title of the tungsten powder in question.

(t) The defendant received, between March 10, 1954 and the present date, from, through or at the hands of the United States Government, credits, cash or effects, or the equivalent thereof, not less than the sum of Six Dollars And Ninety One Cents ($6.91) per pound for the 172,867 pounds of powdered tungsten involved in this proceeding.

(u) The monies, credits or effects, or equivalents thereof mentioned under (t) were paid to defendant after defendant, between said dates, released the said tungsten powder, at the direction, request and under the instructions of the United States Government or one of its agencies, without seeking or obtaining the consent or ap-
183 proval thereof from the plaintiffs, said tungsten powder being so released by defendant to and into the possession of the said United States Government or its agency.

(v) The contract between the United States Government or its agency and the defendant, known as Ordnance Corps Contract No. DA-30-069-ORD-462, and the work done thereunder and the procedure employed in obtaining and in disposing of merchandise therein were deemed and

considered by the governmental agency and the defendant as "classified" matter and therefore secret; the General Services Administration, the Department of the Army, the Ordnance Corps, and the defendant, refused to supply the plaintiffs with any information concerning same and copies of the contract were refused by the defendant to the plaintiffs.

(w) The defendant at all times on March 10, 1954 and since has been and is in knowledge of the fact that the plaintiffs insist and regard the contract between them for the delivery by plaintiffs of the tungsten powder in question to be in full force and effect; that plaintiffs have never at any time waived or released any right they have to the property or to damages for failure to deliver same.

184 (x) Since March 10, 1954, plaintiffs demanded and continue to demand that the defendant take all necessary action to procure the abrogation of the government order upon the defendant directing it not to deliver the said tungsten powder to the plaintiff.

(y) The defendant sold a so-called strategic material on, to-wit, October 1953, for which the plaintiffs paid defendant, to-wit, $80,000.00, and which merchandise was turned over to the plaintiffs; the said merchandise had been acquired by it, the defendant, in connection with and because of the same contract between it and the Ordnance Corps under which defendant had purchased and acquired the tungsten powder in question.

(z) The defendant, in the disposition of the tungsten powder in question, and the plaintiffs in the bidding and acquiring title thereto, followed the same procedure in every respect that was followed in the cases of the said cobalt powder; that both materials were involved in and under the said Ordnance Corps contract with the defendant.

Pursuant to notice served upon counsel of record for defendant, it, the defendant, is required to file with and serve upon the plaintiffs a sworn statement specifically admitting or denying the truth of all of the foregoing requests lettered (a) to (z), inclusive, in accordance with and pursuant to Rule 36 of the Federal Rules of Civil
185 Procedure; also, in case of failure to answer and failure to specifically admit or deny, the consequences to follow will be as provided for in such Rule 36.

Dated at Chicago, Illinois this 16th day of March, 1956.

Rose Finsky, et al. Co-partners, doing business under the name of Surplex Sales, a Co-partnership, Plaintiffs

By *Irwin S. Baskes*
Elmer Gertz
Attorneys for Plaintiffs

186 Proof of mailing further request for admissions to defendant's attorney.

188 MOTION

(Filed Sept. 7, 1956)

Now Comes the defendant, Union Carbide and Carbon Corporation, by R. Tieken, United States Attorney for the Northern District of Illinois, and moves the Court to extend the time for the defendant to file its reply-brief to the motion of the plaintiff for summary judgment and its answering-brief to and including October 10, 1956, and said defendant also moves the court to extend the time for the defendant to file its response to the request of the plaintiff for admissions to said date.

In support of this motion, defendant presents the affidavit of Richard C. Bleloch.

R. Tieken
United States Attorney

RCB:gc

Attached affidavit.

189 **State of Illinois**
County of Cook

Richard C. Bleloch being first duly sworn, on oath deposes and says that he is an Assistant United States Attorney for the Northern District of Illinois, and is handling the defense of the above entitled case on behalf of the Office of the United States Attorney, for this District.

Affiant further deposes and states that on February 3, 1956, the defendant filed a Motion for Summary Judgment and Brief in support thereof. Thereafter, on several occasions at the request of the attorneys for the plaintiff he executed stipulations extending the time for the plaintiffs to file their reply-brief and also their motion for summary judgment.

Affiant further states that although the plaintiffs served some requests for admissions in April, 1956, they were not filed with the Clerk of this Court until August 13, 1956. Plaintiff has also heretofore filed certain further requests for admissions and request for production of documents. After service of the request for admissions, affiant caused copies of the same to be sent to the Attorney General in order to secure the information to prepare the answers to said request, but because of the fact that the request involved many classified documents, the information

190 **could not be readily ascertained. Affiant, however, has secured the answers to the further request for admissions and has produced various documents requested by the plaintiffs.**

When the motion of the plaintiffs for summary judgment was filed on August 13, 1956, they claimed that the defendant had made various admissions by their failure to answer the request for admissions and affiant then pre-

pared a stipulation extending the time for the defendant to file its response to the request for admissions and sent it to the attorneys for the plaintiffs, Messrs. Irwin S. Baskes and Elmer Gertz, and although affiant had executed numerous stipulations at the request of the said attorneys, the said Irwin S. Baskes informed this affiant that he would not stipulate to extend the time for the defendant to file its response to the request for admissions.

Affiant further states that the plaintiffs are claiming damages in excess of $800,000.00 and the United States Government has a substantial interest in this case. That the failure to answer the request for admissions previously has not been due to wilful neglect, but due to the fact that information could not be released until various documents had been declassified.

Affiant makes this Affidavit in support of the Motion of the defendant to extend the time to file its response to the request of the plaintiff for admissions.

Richard C. Bleloch
Assistant United States Attorney for the
Northern District of Illinois.

Jurat

ORDER

(Entered Sept. 7, 1956)

On motion of the Government by the United States Attorney it is

Ordered that the time for the Government to file answering brief be and the same hereby is extended to October 10, 1956 and that the plaintiff shall file a reply brief ten days thereafter and it is

Further Ordered that the plaintiff be and hereby is given five days from this date to file counter-affidavits to the request for admissions and that the plaintiff's motion for summary judgment be and the same hereby is set for hearing or resetting on September 13, 1956

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PLAINTIFFS' COUNTER-AFFIDAVIT IN RESPONSE TO DEFENDANT'S MOTION FOR EXTENSION OF TIME TO ANSWER "REQUEST FOR ADMISSIONS ON THE PART OF DEFENDANT"

(Filed Sept. 11, 1956)

State of Illinois,
County of Cook—ss.

Maxwell N. Andalman, being first duly sworn, on oath deposes and states as follows:

1. He is one of the plaintiffs herein and the duly authorized agent in this behalf of all of the plaintiffs. He has personal knowledge of all of the matters and things herein set forth, and if sworn as a witness herein, would be competent to and would testify thereto.

193 2. He makes this affidavit for the purpose of opposing the motion of the defendant for leave to answer the "Request for Admissions on the Part of Defendant", served by the plaintiffs on the defendant approximately ten (10) months ago, and for the further purpose of answering the affidavit of Richard C. Bleloch filed in support of defendant's said motion. The said last mentioned affidavit is erroneous and misleading in various substantial respects, and the said motion is improper, inequitable and unfounded, and should be denied as a matter of law, fact and good conscience, all as more fully set forth hereinafter.

3. This is an action on a contract between the plaintiffs and the defendant, Union Carbide & Carbon Corp., now pending before this court on motions for summary judgment filed by the plaintiffs and by the defendant, respectively. Neither the United States, nor any agency or instrumentality thereof, is a party to this suit. Prior to the filing of suit, the plaintiffs were advised, both verbally and in writing, by United States Government Officials that there was and is no privity between the plaintiffs and the United States on the subject matter hereof, all as more fully set forth in the affidavits in support of the plaintiffs' said motion for summary judgment, which said affidavits are incorporated herein by reference with the same force and effect as if set forth herein in full. Notwithstanding such statements by the United States, the United States Attorney is purporting to act herein as the attorney for the defendant.

4. As the result of a good deal of study and effort, the plaintiffs, through their attorney, prepared a state-
194 ment of thirty-three facts which they believed basic to their cause of action, and caused same to be served upon the defendant, on or about November 13, 1955, with the request that the said facts be admitted or otherwise answered, all as provided in the Code of Civil Procedure and the rules of this court. Said Richard C. Bleloch personally receipted for the said "Request for Admissions on the part of Defendant" on November 13, 1955. There being no requirement in the rules for filing the original or a copy thereof in court, such original bearing the receipt of said Richard C. Bleloch was not filed until the plaintiffs filed their motion for summary judgment.

5. At no time since November 13, 1955, and up to the date hereof, has the defendant answered the said "Request for Admissions on the Part of Defendant", or any

part thereof. The defendant does not indicate in its motion or its affidavit, or in any way, the nature of the answers it desires to make or the respects in which such answers may constitute a defense to the plaintiffs' cause of action; and the plaintiffs are not informed with respect thereto. The plaintiffs verily believe that the said thirty-three allegations of fact set forth in their said "Request for Admissions on the Part of Defendant" are true in substance and in fact and they have relied upon the truth thereof in their proceedings herein, including their motion for summary judgment.

6. At no time prior to its motion of September 7, 1956 (made ten (10) months after service upon it of the said requests for admissions) did the defendant request the court to grant additional time to answer the said requests or to excuse the answering thereof. Until its said motion of September 7, 1956, the defendant sim-
195 ply ignored the said request for admissions and did nothing whatsoever with respect thereto. The defendant has set forth in its motion and affidavit no sufficient reason to excuse its delay of ten (10) months, and such delay is unreasonable.

7. In March, 1956, the plaintiffs served their "*Further* Request for Admissions" (underscoring ours) on the defendant, so that at such time the defendant was reminded of the original request for admissions, if indeed it had forgotten same. The defendant answered said further requests in June, 1956.

8. The said thirty-three facts must, therefore, be taken to be admitted as true, pursuant to law and the Code of Civil Procedure and the rules of this court; and the plaintiffs have accordingly taken the said facts to be admitted and have proceeded herein on such assumption.

9. If the court now gives the defendant leave to respond to the said request for admissions, the plaintiffs

would be greatly prejudiced thereby and may be put to added expense and delay for the taking of new depositions and other discovery proceedings. The plaintiffs have already gone to great expense and trouble in taking voluminous depositions and other discovery and in and about their said motion for summary judgment and this cause has been submitted to this court on said motion.

Maxwell N. Andalman

Jurat

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ORDER

(Entered Sept. 13, 1956)

This cause coming on for hearing or resetting plaintiffs' motion for summary judgment and defendant's motion to extend time to answer Requests for Admissions come the parties by their counsel and the Court being fully advised it is

Ordered that defendant be and hereby is granted until October 10, 1956 to file answers to all plaintiffs' Requests for Admissions and hearing on motions of plaintiff and defendant for summary judgment be and the same hereby is reset for November 16, 1956 at 2:00 p.m.

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RESPONSE TO REQUEST FOR ADMISSIONS

(Filed Oct. 8, 1956)

Union Carbide and Carbon Corporation, the defendant, makes the following admissions and denials in response to the request for admissions of the plaintiffs, dated November 17, 1955.

1. Defendant admits that it entered into a contract with the United States of America, as of February 13, 1952, which was identified as Contract No. DA-30-069-ORD-462.

2. Defendant admits that it acquired the materials described in Request 2, in order to perform its obligations under Government contracts.

3. Defendant denies the matter stated in Request 3, but admits it received from the Government, a notice of termination of Contract No. DA-30-069-ORD-462, on March 11, 1953.

3a. Defendant admits the matter set forth in Request 3a.

4. Defendant admits the matter set forth in Request 4.

5. Defendant admits that it acquired the material referred to in Request 4, and that it was being held at the time of the receipt of the notice of termination referred to in its response to Request 3 to perform its obligations under Government contracts.

6. Defendant admits the matters set forth in Request 6, but states that title to the material referred to in Request 4 was in the Government, by virtue of the partial payments clause of Contract No. DA-30-069-ORD-462, or its companion contract, Contract No. DA-30-069-ORD-128.

7. Defendant denies the matter stated in Request 7, but admits having received written instructions in January, 1954, to sell the material referred to in Request 4 on a competitive bid basis, under the Armed Services Procurement Regulations, subject to the approval of the Property Disposal Officer of the New York Ordnance District, Department of the Army.

8. Defendant denies the matter stated in Request 8.

9. Defendant denies the matter stated in Request 9, but states that the contract referred to was entered upon by defendant with the United States of America acting through the Ordnance Corps of the Department of the Army.

10. Defendant admits the matter stated in Request 10, but states that title to the material referred to in Request

4 was in the Government by reason of the partial payment clause in Contract No. DA-30-069-ORD-462, or its companion contract, Contract No. DA-30-069-ORD-128.

11. Defendant admits the matter stated in Request 11, but states that title to the material referred to in Re-
204 quest 4 was in the Government by reason of the partial payment clause in Contract No. DA-30-069-ORD-462, or its companion contract, Contract No. DA-30-069-ORD-128.

12. Defendant admits that it advertised the sale of the material referred to in Request 4 in newspapers and periodicals, including the "Waste Trade Journal," stating that bids would be accepted until 5:00 P.M. February 23, 1954; that it wrote a letter dated February 11, 1954 to plaintiffs informing them that bids for said material would be accepted until 5:00 P.M., February 23, 1954, but denies the rest of the matters set forth in Request 12. Defendant states that in its said letter to plaintiffs dated February 11, 1954 the following appears: "Terms of payment will be our option. (Cashier's check, certified check, or sight draft)."

13. Defendant cannot admit or deny the matter set forth in Request 13 because it relates to an alleged statement made to plaintiffs by persons other than defendant or its representatives.

14. Defendant admits the matter stated in Request 14.

15. Defendant admits that on March 6, 1954 the Office Manager of its Division, Haynes Stellite Company, handed the plaintiffs the following letter:

> "This is to advise you have been awarded
> Approximately 173,205 lbs of powdered tungsten carbon reduced 99% tungsten
> Approximately 10,268 lbs of lampblack
> Approximately 40 grinding wheels
> This award was granted in accordance with your bid of February 23, 1954."

16. Defendant admits the matter stated in Request 16.

17. Defendant admits the matter stated in Request 17.

18. Defendant denies the matter stated in Request 18.

19. Defendant admits the matter stated in Request 19.

20. Defendant admits that on August 25, 1954 the Office Manager of its Division, Haynes Stellite Company, wrote to plaintiffs the following letter:

> "A sample lot of tungsten powder was delivered to you at $1.50321 per pound. This tungsten was bid on by you at staggering prices and the average price per pound for the entire bid amounted to $1.3046. We are enclosing our check in the amount of $130.25 which constitutes an overpayment by you at the time the sample tungsten powder was delivered."

Defendant further admits that it enclosed in this letter the check and voucher referred to and that the letter had reference to the sample quantity of powder delivered to the plaintiffs on March 6, 1954. Defendant denies the rest of the matters set forth in Request 20.

21. Defendant admits that under date of March 10, 1954 plaintiffs wrote defendant the following letter:

> "We are enclosing herewith copy of a letter forwarded to New York which is self-explanatory. Naturally, this letter is written in view of your phone conversation and confirming wire of today's date.
>
> "In view of this wire, we are holding our check for the first payment on the tungsten powder which we would have released today to you.
>
> "Please forward via Kain's Motor Service the 10,000 odd pounds of lamp black and the 40 grinding wheels at your convenience to Surplex Sales, 2409 S. LaSalle Street, Chicago, Illinois.
>
> "Should the powder be released, advise us immediately and we will forward our check as agreed and

ship the tungsten powder to Surplex Sales c/o Edward Lasham Company at 1545 South State Street, Chicago, Illinois.

"Thank you for your cooperation in this matter.

Defendant admits that plaintiffs orally demanded the delivery of the tungsten powder referred to in Request 4 on the dates indicated in Request 21.

22. Defendant denies the matter stated in Request 22.

23. Defendant admits that under date of January 29, 1954 Christian Van Heest, on behalf of the Deputy District Chief of the New York Ordnance District, Department of the Army, wrote the defendant the following letter:

"Reference is made to the termination inventory submitted by your company on reference contract, and listed on the following schedule:

DD Form 542, Schedule A—Items Nos. 7—173295 lbs. Tungsten

It has been determined that the above item be disposed of as salvage by sale on a competitive bid basis in accordance with the following instructions as outlined in ASPR, Section 8-608.2 (D).

a. Bids must be solicited from prospective bidders in accordance with ASPR, Section 8-608.2, since the acquisition value of this material is in excess of $25,000. A notice of the proposed sale must be published in a newspaper of general circulation in the locality in which the property is located. Requests for bids must show closing date and hour when all bids must be in. However, if your company desires to submit a bid, this bid must be mailed to this office immediately, or at least before the closing date effective in your request for bids.

207 b. You will maintain a log of the above mailings.

c. You will allow an adequate time interval between

mailing and receipt of bids to permit an inspection of the material and time for submission of bids.

d. If material is to be sold as salvage, all items must be listed.

e. All bids from prospective bidders must be in writing and submitted in duplicate. Bids must be opened at the date and time specified in the request for bids.

f. One copy of each bid must be submitted to New York Ordnance District together with a copy of your log showing the mailings. Copies of negative bids must also be submitted to New York Ordnance District. The aforementioned copies must be accompanied by a cover letter from your company.

g. The Property Disposal Officer will evaluate the bids and notify you as to the successful bidder by Contracting Officer's letter.

h. All sales will be made on a cash basis. Any credit extended to the successful bidder will be submitted to the Property Disposal Officer, New York Ordnance District.

i. Copies of signed receipts for all material picked up by the successful bidder will be submitted to the Property Disposal Officer, New York Ordnance District.

j. The Property Disposal Officer must be advised when the sale is completed, material removed, and of the final dollar value of the sale. This information is required for a complete analysis of this termination action.

Close adherence to the above will expedite the disposal of your inventory and enable the New York Ordnance District to complete final settlement in an expeditious and favorable manner."

23. Defendant admits that under date of January 24, 1954 said Christian Van Heest wrote a similar letter with respect to the lamp black and grinding wheels referred to in Request 4.

24. Defendant admits the matter stated in Request 24.

25. Defendant admits the matter stated in Request 25.

26. Defendant denies the matter set forth in Request 26, but admits that it received a letter from the New York Ordnance District, Department of the Army over the signature of Henry C. Laskin, Contracting Officer, dated March 5, 1954, reading as follows:

> "This is to advise that the bid of $226,570.70 by the Surplex Sales, for the termination inventory submitted by your company on Termination Inventory Schedule B, Purchase Parts and Raw Material, DD Form 543 and Schedule C, Work in Process, DD Form 544, has been accepted.
>
> A disposal credit of $226,570.70 will be deducted from your final settlement proposal claim."

27. Defendant admits that on March 10, 1954 it sent the following telegram to plaintiffs:

> "The following wire has just been received from New York Ordnance District: 'From Ordeh-ID-T15578 Laskin Contracting Officer this will CFM Telecon of this morning in connection with Contract DA-30-069-ORD-462 the following sales of termination inventory have been suspended CLN sales to metals and residues UR item No. 1-13818 lbs. 80 percent tungsten UR item 2-15248 lbs 94 per cent tungsten sale to Surplex Sales UR item No 10-173205 lbs powdered tungsten carbon reduced 99 percent tungsten pending sale of 47200 lbs tungsten powder located at Niagara Falls these sales are suspended no deliveries are to be made whatsoever pending further instructions from New

York Ordnance District you are instructed to advise all bidders involved confirm immediately'."

209 28. Defendant denies the matter stated in Request 28.

29. Defendant denies the matter stated in Request 29.

30. Defendant denies the matter stated in Request 30.

31. Defendant denies the matter stated in Request 31.

32. Defendant denies the matter stated in Request 32.

33. Defendant denies the matter stated in Request 33.

Except as specifically admitted or denied herein, defendant denies all statements or allegations made by the plaintiffs in their Request for Admissions.

R. Tieken
United States Attorney
Attorney for Defendant

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AMENDED RESPONSES TO CERTAIN FURTHER REQUESTS FOR ADMISSIONS

(Filed Oct. 8, 1956)

Now Comes the defendant, Union Carbide & Carbon Corp., by R. Tieken, United States Attorney for the Northern District of Illinois, and for leave of court first had and obtained files herein its Amended Responses to the following Certain Requests for Admissions:

Request (a). Defendant denies that it had title to the tungsten powder in question on the date indicated, contends that title was in the Government on such date by reason of the partial payments clause of Contract DA-30-069-ORD-128 and Contract DA-30-069-ORD-462, under which defendant acquired said tungsten powder, but admits it had possession of 172,723 pounds of such powder on such date.

Request (m). Defendant admits that the contracting officer did not make reservation of title or possession by

written communication during the time indicated other than that set forth in the prime Contract DA-30-069-ORD-128 and Contract DA-30-069-ORD-462.

R. Tieken
United States Attorney

RCB:sak

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NOTICE

(Filed Oct. 9, 1956)

To: Robert Tieken
Attorney for the Defendant
Suite 450, U. S. Court House
Clark and Adams Streets
Chicago 4, Illinois

Please take notice that we shall appear before the Honorable Michael L. Igoe, Judge in the United States District Court, in the court room usually occupied by him, or before any Judge sitting in his place and stead in the U. S. Court House at Clark and Adams Streets, in Chicago, Illinois, on Tuesday, October 9, at the opening of Court, at 10:00 o'clock A.M., or at such time and place as such motion shall be called and shall present the attached motion for production of documents, and for the entry of an order in accordance therewith and the attached
213 draft, and for such other and further orders as the Court shall see meet, at which time and place you may appear if you so see fit.

Irwin S. Baskes
Elmer Gertz
Attorneys for Plaintiffs

Dated at Chicago, Illinois
this 8th day of October,
1956.

I hereby acknowledge receipt of a copy of the above Notice and Motion and Draft Order therein mentioned this 8th day of October, 1956.

Robert Tieken
U. S. Attorney

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MOTION FOR PRODUCTION OF DOCUMENTS

(Filed Oct. 9, 1956)

Plaintiffs, Rose Finsky, et al., by Irwin S. Baskes and Elmer Gertz, their attorneys, move the Court for an Order requiring the defendant, Union Carbide & Carbon Corp., a New York Corporation, Owners and Operators of Division thereof known as Haynes Stellite Co., to produce and permit plaintiffs to inspect and to copy, or alternatively, to furnish authenticated copies to plaintiffs, each of the following documents:

1. Contract between the United States of America (acting through the Ordnance Corps of the Department of the Army) and Haynes Stellite Co., Division of Union Carbide & Carbon Corp., identified as Contract DA-30-069-ORD-128.

214A 2. Any and all instruments and documents of every kind and character involving the Tungsten powder, or plaintiffs, written, dated, received, or sent subsequent to the date of the said Contract, and up to and including the date when the instant suit was filed, other than any instruments or documents heretofore produced by the defendant.

Defendant, Union Carbide & Carbon Corp., a New York Corporation, Owners and Operators of Division thereof known as Haynes Stellite Co., has the possession, custody or control of each of the foregoing documents. Each

of them constitutes or contains evidence relative and material to the matters involved in this action.

Irwin S. Baskes
Elmer Gertz
Attorneys for Plaintiffs

Affidavit of Elmer Gertz attached.

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ORDER FOR PRODUCTION OF DOCUMENTS
(Entered Oct. 9, 1956)

On verified motion of the plaintiffs, after due notice, and the Court having heard the arguments of counsel and being fully advised in the premises, and having jurisdiction of the subject matter hereof and of the parties hereto,

It Is Ordered that the defendant, Union Carbide & Carbon Corp., a New York Corporation, Owners and Operators of Division thereof known as Haynes Stellite Co., produce and permit plaintiffs to inspect and to copy, or alternatively, to furnish within ten days from the date hereof, authenticated copies to plaintiffs, each of the following documents:

1. Contract between the United States of America (acting through the Ordnance Corps of the Department of the Army) and Haynes Stellite Co., Division of Union Carbide & Carbon Corp., identified as Contract No. DA-30-069-ORD-128.

217 2. Any and all instruments and documents of every kind and character involving the Tungsten powder, or plaintiffs, written, dated, received, or sent subsequent to the date of the said Contract, and up to and including the date when the instant suit was filed, other than any instruments or documents heretofore produced by the defendant.

Enter:

Igoe
Judge

Dated at Chicago this
9th day of October, 1956.

231

AFFIDAVIT OF GLEN H. SHELTON IN SUPPORT OF DEFENDANT'S MOTION FOR ENTRY OF SUMMARY JUDGMENT.

(Filed Oct. 10, 1956)

Glen H. Shelton, being first duly sworn, on oath deposes and says that:

1. He is Office Manager and Manager of Accounting of the Haynes Stellite Company, a Division of Union Carbide & Carbon Corp., defendant in the above entitled cause, and that he was so employed during the years 1951, 1952, 1953, 1954 and 1955.

2. Affiant further states that he now has knowledge of the facts in this case, and that if called as a witness, he would be able to testify to all of the facts hereinafter set forth.

3. The Haynes Stellite Company entered into a Department of Defense Contract No. DA-30-069-ORD-128 as of July 6, 1951 and as of February 13, 1952 into Department of Defense Contract No. DA-30-069-ORD-462. That on both contracts the defendant was required to deliver to the government an item known as HV Shot, 60,000 units being required under Contract No. DA-30-069-ORD-128 and 90,000 units being required under Contract No. DA-30-069-ORD-462; that the two contracts were companion contracts, Contract No. DA-30-069-ORD-462 being merely for continued production of the item required under Contract No. DA-30-069-ORD-128.

4. Purusant to the terms of the said contracts, the Haynes Stellite Company acquired a total of approximately 972,000 pounds of tungsten powder to manufacture shell cores. This tungsten was physically received in the Receiving Department of the Haynes Stellite Company plant at Kokomo, Indiana, and the quantities and lot numbers

were recorded on receiving reports. These receiving reports were distributed to the Balance of Stores Sec-
232 tion, where they were recorded as receipts, and the balance in stores was increased accordingly. This material was physically maintained separately from other tungsten powder used in manufacturing normal products of Haynes Stellite Company. When said tungsten powder was withdrawn from the stores to be blended with cobalt and lamp black in order to otbain the powder used to press into cores, issue slips were prepared and the withdrawals were then posted to the Balance of Stores records and charged to a process account designated PN-68. This Account Symbol identified intermediate cost center where costs were collected in the production of these shell cores.

5. Approximately 513,000 pounds of said tungsten powder was consumed in the production of cores under Contract DA-30-069-ORD-128, and approximately 273,000 pounds of this tungsten powder was consumed under Contract No. DA-30-69-ORD-462. Approximately 173,200 pounds of unblended powder was still in inventory at the termination of the contracts.

6. Each of said contracts contained a provision, reading in part, as follows:

> "Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and nondurable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the government forthwith upon said acquisition or production."

7. Pursuant to the above provision, the Haynes Stellite Company made applications to the government for partial payments under Contract No. DA-30-069-ORD-128, and prior to March 11, 1953, has received from the government, a substantial portion of the cost of said tungsten powder as a result of said applications.

8. Both contracts terminated for the convenience of the government on March 11, 1953 prior to their completion. Prior to the termination of the contracts, the government had made the following partial payments to Haynes Stellite Company, pursuant to applications made, as heretofore stated:

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Amount	*Date of Payment*
$ 121,586.42	1/31/52
191,749.87	4/30/52
553,800.76	6/30/52
1,912,000.00	11/30/52
597,788.00	3/9/53
$3,376,925.02	

While the partial payments were made by the government to Haynes Stellite Company under Contract No. DA-30-069-ORD-128, the tungsten powder to which the payments related was utilized in production under both Contracts Nos. DA-30-069-ORD-128 and DA-30-069-ORD-462.

9. On March 6, 1954 $641,862.81 of such payments had not been liquidated and were still outstanding.

10. Attached hereto and made a part of this affidavit by reference thereto are true and correct copies of the records of the Haynes Stellite Company, showing the receipt, storage and consumption of the tungsten powder involved in this case.

In connection with said records, "SX Stores Account" designates allied worked material. "HZ" is a symbol

used to designate the government stores account.

11. Affiant further states that the tungsten powder involved in this suit (a) is the same tungsten powder which was acquired for the performance of government contracts by the Haynes Stellite Company as stated hereinabove; (b) consists of powder, like the material for which the government made payments to Haynes Stellite Company as a result of applications for partial payments as hereinabove stated, which was acquired by the Haynes Stellite Company subsequently to the acquisition of said material; and, (c) is the same tungsten powder which was offered for sale after the termination of the government contracts, subject to the right of the government to reject any and all bids.

12. Further affiant sayeth not.

Glen H. Shelton

Jurat

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AFFIDAVIT OF GLEN H. SHELTON IN OPPOSITION TO MOTION OF PLAINTIFFS FOR ENTRY OF SUMMARY JUDGMENT.

(Filed Oct. 10, 1956)

Glen H. Shelton, being first duly sworn, on oath deposes and says that:

1. He is Office Manager and Manager of Accounting of the Haynes Stellite Company, a Division of Union Carbide & Carbon Corp., defendant in the above entitled cause, and he was so employed during the years 1951, 1952, 1953, 1954, and 1955.

2. Affiant further states that he now has knowledge of the facts in this case, and that if called as a witness, he would be able to testify to all of the facts hereinafter set forth.

3. The tungsten powder involved herein was part of the items for which sealed bids were invited, pursuant to advertisements. Said advertisements specified "terms cash."

4. On March 6, 1954 affiant met two of the plaintiffs, Maxwell Andalman and Joseph Andalman, at the office of the Haynes Stellite Company in Kokomo, Indiana. At that time, said plaintiffs informed affiant that they desired to secure one barrel of tungsten powder and would pay for it at that time. Accordingly, one barrel of tungsten powder was turned over to them and they turned over to affiant a check in the sum of $701.68 in payment thereof. The amount of said check was figured on graduated bid-
235 ding for the higher amount of the bid submitted by the plaintiffs. At that time said plaintiffs informed this affiant that they were not prepared to pay for and take delivery of the remainder of the said tungsten powder on that date. But said plaintiffs informed this affiant that they would return to their home in Chicago and ascertain what arrangements they could make, with reference to financing the purchase of the remainder of the tungsten and would contact this affiant at a later date.

5. Affiant denies that the check for $701.68 was accepted by the affiant or any other person on behalf of the defendant as a payment on account.

6. Affiant further denies that any arrangements were made with either affiant or any other person on behalf of the defendant with reference to an extension of time within which plaintiffs would raise the money and pay and accept the balance of the tungsten powder.

7. Affiant specifically denies that he ever stated to plaintiffs that he would give them a week or so to bring in approximately $115,000.00, and that he would give them three weeks thereafter to pay the balance of the purchase price.

8. Affiant further states that on March 6, 1954 plaintiffs did not tender or offer to pay the entire amount of their bid in cash or its equivalent and, in fact, informed this affiant that they were not prepared to do so.

9. Affiant further states that on March 6, 1954 plaintiffs requested this affiant to give them a letter stating they were the highest bidder so that said letter could be used in their efforts to obtain financing.

10. Affiant further states that prior to the time the plaintiffs ever advised this affiant that they had made arrangements for financing or were prepared to tender the full amount of the purchase price, in accordance with the solicitation for bids, the defendant was advised by the United States Government officials to withdraw the tungsten powder from sale and to turn it over to the General Services Administration for stockpiling.

G. H. Shelton

Jurat

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AMENDMENT TO THE ANSWER OF THE DEFENDANT.

(Filed Oct. 18, 1956)

Now Comes Union Carbide & Carbon Corp., defendant herein, by R. Tieken, United States Attorney for the Northern District of Illinois, and leave of court being first had and obtained, files the following Amendment to the Answer of the Defendant:

AFFIRMATIVE DEFENSES.

As further affirmative defenses to all counts of the complaint as amended the defendant hereby pleads the following additional affirmative defenses:

1. The Haynes Stellite Company entered into a De-

partment of Defense Contract No. DA-30-069-ORD-128 as of July 6, 1951 and as of February 13, 1952 into Department of Defense Contract No. DA-30-069-ORD-462. That on both contracts the defendant was required to de-
244 liver to the government an item known as HV Shot, 60,000 units being required under Contract No. DA-30-069-ORD-128 and 90,000 units being required under Contract No. DA-30-069-ORD-462; that the two contracts were companion contracts, Contract No. DA-30-069-ORD-462 being merely for continued production of the item required under Contract No. DA-30-069-ORD-128.

2. Pursuant to the terms of the said contracts, the Haynes Stellite Company acquired a total of approximately 972,000 pounds of tungsten powder to manufacture shell cores. This tungsten was physically received in the Receiving Department of the Haynes Stellite Company plant at Kokomo, Indiana, and the quantities and lot numbers were recorded on receiving reports. These receiving reports were distributed to the Balance of Stores Section, where they were recorded as receipts, and the balance in stores was increased accordingly. This material was physically maintained separately from other tungsten powder used in manufacturing normal products of Haynes Stellite Company. When said tungsten powder was withdrawn from the stores to be blended with cobalt and lamp black in order to obtain the powder used to press into cores, issue slips were prepared and the withdrawals were then posted to the Balance of Stores records and charged to a process account designated PN-68. This Account Symbol identified an intermediate cost center where costs were collected in the production of these shell cores.
245 3. Approximately 513,000 pounds of said tungsten powder was consumed in the production of cores under Contract DA-30-069-ORD-128, and approximately 273,000 pounds of this tungsten powder was consumed un-

der Contract No. DA-30-069-ORD-462. Approximately 173,200 pounds of unblended powder was still in inventory at the termination of the contracts.

4. Each of said contracts contained a provision, reading in part, as follows:

> "Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process, and nondurable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the government forthwith upon said acquisition or production."

5. Pursuant to the above provision, the Haynes Stellite Company made applications to the government for partial payments under Contract DA-30-069-ORD-128, and prior to March 11, 1953, had received from the government, a substantial portion of the cost of the said tungsten powder as a result of said applications.

6. Both contracts were terminated for the convenience of the government on March 11, 1953 prior to their completion. Prior to the termination of the contracts, the government had made the following partial payments to Haynes Stellite Company, pursuant to applications made, as heretofore stated:

246

Amount	Date of Payment
$ 121,586.42	1 /31/52
191,749.87	4/30/52
553,800.76	6/30/52
1,912,000.00	11/30/52
597,788.00	3/ 9/53
$3,376,925.02	

While the partial payments were made by the government to Haynes Stellite Company under Contract No. DA-30-069-ORD-128, the tungsten powder to which the payments related was utilized in production under both Contracts Nos. DA-30-069-ORD-128 and DA-30-069-ORD-462.

7. On March 6, 1954 $641,862.81 of such payments had not been liquidated and were still outstanding.

8. The tungsten powder involved in this suit (a) is the same tungsten powder which was acquired for the performance of government contracts by the Haynes Stellite Company as stated hereinabove; (b) consists of powder, like the material for which the government made payments to Haynes Stellite Company, as a result of applications for partial payments as hereinabove stated, which was acquired by the Haynes Stellite Company subsequently to the acquisition of said material; and, (c) is the same tungsten powder which was offered for sale after the termination of the government contracts, subject to the right of the government to reject any and all bids.

R. Tieken
United States Attorney

RCB:sak

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MOTION

(Filed Nov. 1, 1956)

Now Comes Union Carbide & Carbon Corp., the defendant herein, by R. Tieken, United States Attorney for the Northern District of Illinois, and moves this court to extend the time for the defendant to file its Answer to the Further Request for Admissions heretofore served by the plaintiffs, for a period of thirty (30) days.

In support of this Motion the defendant refers to the

Affidavit of Richard C. Bleloch attached hereto and made a part hereof.

R. Tieken
United States Attorney

RCB:sak

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AFFIDAVIT

Richard C. Bleloch, being first duly sworn, on oath deposes and says that:

1. He is an Assistant United States Attorney and is the attorney in charge of the defense of the above entitled cause.

2. Affiant further states that although the defendant is Union Carbide & Carbon Corp., this suit involves government defense contracts, and the United States of America is a party in interest, inasmuch as the contracts are "cost-plus contracts," and any obligation incurred by the defendant, pursuant to the terms of said contracts, will ultimately be borne by the United States of America.

3. The contracts involved in this case are Department of Defense contracts, which are "restricted documents," and, therefore, classified for security purposes, and in order for any information to be released regarding said contracts, or anything arising out of or connected with said contracts, it is necessary that the information be downgraded to "unclassified."

4. On October 22, 1956, R. Tieken, United States Attorney for the Northern District of Illinois, attorney for the defendant herein, was served with some Further Request for Admissions, which were dated October 19, 1956. Copies of said Further Request for Admissions were forwarded to the Department of Justice, with a request that they be submitted to the Department of Defense and to

obtain the information necessary to answer said Further Request for Admissions.

250 5. Affiant further states that on October 29, 1956, he was advised by the Department of Justice that the information necessary to answer the Further Request for Admissions was being obtained from the Department of the Army through the Department of Defense, but that they will require an additional thirty (30) days within which to obtain the necessary information, and they requested this affiant to move the court to extend the time to file answers to said Further Request for Admissions.

6. Affiant makes this Affidavit in support of the Motion of the Defendant for an extension of thirty (30) days' time within which to file its Answers to the further Request for Admissions.

Richard C. Bleloch
Assistant United States Attorney
Affiant

Jurat

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ANSWERS OF DEFENDANT TO FURTHER REQUEST FOR ADMISSIONS DATED OCTOBER 19, 1956.

(Filed Nov. 30, 1956)

Union Carbide and Carbon Corporation, the defendant, makes the following admissions and denials in response to the further request for admissions of the plaintiffs dated October 19, 1956:

(a) Defendant does not have knowledge or information sufficient to form a belief as to whether the United States, or an instrumentality or agency thereof, delivered to the plaintiffs a bill of sale or document with respect to title to the cobalt powder referred to in request (a), but states

that no such delivery was made to defendant. Defendant denies that the approval of plaintiffs' bid referred to in request (a) was either a bill of sale or document with respect to title.

Defendant further states that title was transferred to the plaintiffs upon payment of the purchase price and delivery of the cobalt powder to them.

263 (b) Defendant does not have knowledge or information sufficient to form a belief as to whether the United States, or an instrumentality or agency thereof, delivered to the plaintiffs a bill of sale or document with respect to title to the lamp black referred to in request (b), but states that no such delivery was made to defendant. Defendant denies that the approval of plaintiffs' bid referred to in request (b) was either a bill of sale or document with respect to title.

Defendant further states that title was transferred to the plaintiffs upon payment of the purchase price and delivery of the lamp black.

(c) Defendant does not have knowledge or information sufficient to form a belief as to whether the United States, or an instrumentality or agency thereof, delivered to the plaintiffs a bill of sale or document with respect to title to the grinding wheels referred to in request (c), but states that no such delivery was made to defendant. Defendant denies that the approval of plaintiffs' bid referred to in request (c) was either a bill of sale or document with respect to title.

Defendant further states that title was transferred to the plaintiffs upon payment of the purchase price and delivery of the grinding wheels.

(d) Defendant does not have knowledge or information sufficient to form a belief as to whether the United States,

or an instrumentality or agency thereof, delivered to
264 the plaintiffs a bill of sale or document with respect to title to the barrel of tungsten powder referred to in request (d), but states that no such delivery was made to defendant. Defendant denies that the approval of plaintiffs' bid referred to in request (d) was either a bill of sale or document with respect to title.

Defendant further states that title was transferred to the plaintiffs upon payment of the purchase price and delivery of the barrel of tungsten powder.

(e) Defendant admits the matter stated in request (e).

(f) Defendant admits the matter stated in request (f) but states that the arrangements for payment in fact offered by plaintiffs were unacceptable to defendant and that defendant did not state or otherwise indicate that arrangements other than a payment in cash would be acceptable.

Defendant did inform the plaintiffs that the tungsten powder had been advertised for sale for cash and that the tungsten powder had been advertised for sale for cash and that the employees of the defendant to whom the plaintiffs proposed partial payments were not authorized to vary the terms of the sale.

Except as specifically admitted or denied herein, defendant denies all statements or allegations made in plaintiffs' further request for admissions.

R. Tieken
United States Attorney

RCB:sak

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NOTICE

To: Robert Tieken
Attorney for the Defendant
Suite 450, U. S. Court House
Clark Street at Adams
Chicago 4, Illinois

We herewith serve upon you copies of the Plaintiffs' Further Requests for Admissions in accordance with Rule 36 of the Federal Rules of Civil Procedure

Dated at Chicago, Illinois, this 19th day of October, 1956.

Irwin S. Baskes
Elmer Gertz
Attorneys for Plaintiffs

Received copies of the above Notice and the Further Requests for Admissions therein mentioned this 22nd day of October, 1956.

Robert Tieken

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FURTHER REQUESTS FOR ADMISSIONS

The Plaintiffs, Rose Finsky, Avrum Andalman, Joseph M. Andalman, Lee S. Andalman, Yetta S. Andalman and Maxwell N. Andalman, co-partners, doing business under the name of Surplex Sales, a co-partnership, request the Defendant, Union Carbide & Carbon Corp., a New York Corporation, Owners and Operators of Division thereof known as Haynes Stellite Co., within fifteen days after the service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the time of trial, all in accordance with Rule 36 of the Federal Rules of Civil Procedure.

THAT:

A. At no time following the approval of plaintiffs' bid for the cobalt powder by instrumentalities of the
270 United States, did the United States, or any instrumentality or agency thereof, deliver to the defendant or the plaintiffs any bill of sale or document with respect to title to the said cobalt powder, other than the written approval of the plaintiffs' bid. (If such is not the case, set forth in full any and all documents with respect to title delivered to defendant or plaintiffs, including the dates thereof).

B. At no time following the approval of plaintiffs' bid for the lamp black by instrumentalities of the United States, did the United States, or any instrumentality or agency thereof, deliver to the defendant or the plaintiffs any bill of sale or document with respect to title to the said lamp black, other than the said written approval of the plaintiffs' bid. (If such is not the case, set forth in full any and all documents with respect to title delivered to defendant or plaintiffs, including the dates thereof).

C. At no time following the approval of plaintiffs' bid for the grinding wheels by instrumentalities of the United States, did the United States, or any instrumentality or agency thereof, deliver to the defendant or the plaintiffs any bill of sale or document with respect to title to the said grinding wheels, other than the said written approval of the plaintiffs' bid. (If such is not the case, set forth in full any and all documents with respect to title delivered to defendant or plaintiffs, including the dates thereof).

D. At no time following the delivery to plaintiffs by defendant of the barrel of tungsten powder did the
271 United States, or any instrumentality or agency thereof, deliver to plaintiffs or defendant any bill of sale

or instrument of title other than the said approval of plaintiffs' bid. (If such is not the case, set forth in full any and all documents with respect to title delivered to defendant or plaintiffs, including the dates thereof).

E. At no time preceding or following the approval of the plaintiffs' bids for the said cobalt powder, lamp black, grinding wheels and tungsten powder did the defendant request of the United States, or any instrumentality or agency thereof, any bill of sale or instrument of title with respect thereto. (If such is not the case, set forth in full any request made by defendant for any bill of sale or instrument of title, including the dates of such request).

F. At no time prior to the filing of plaintiffs' suit did defendant state to plaintiffs that the said tungsten powder would not be available to them by reason of any alleged failure to make arrangements for the payment therefor. (If such is not the case, set forth in full the particulars, including times, places and other facts and circumstances).

Pursuant to notice served upon the counsel of record for defendant, it, the defendant, is required to file with, and serve upon, the plaintiffs a sworn statement, specifically admitting or denying the truth of all of the foregoing requests lettered A to F, inclusive, in an ordinary answer with and pursuant to Rule 36 of the Federal Rules of Civil Procedure; also, in case of failure to specifically admit or deny, the consequences to follow will be as provided 272 for in such Rule 36.

Dated at Chicago, Illinois, this 19th day of October, 1956.

Rose Finsky, et al.

Plaintiffs

By: Irwin S. Baskes
Elmer Gertz
Attorneys for Plaintiffs

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NOTICE

(Filed Dec. 10, 1956)

TO: Robert Tieken
Attorney for the Defendant
Suite 450, U. S. Court House
Clark Street at Adams
Chicago 4, Illinois

Please take notice that Plaintiffs are this day filing their Reply to the Brief of Defendant Filed in Opposition to Plaintiffs' Motion for Summary Judgment, and the supplemental affidavit of Maxwell N. Andalman, and the additional request of Plaintiffs for admissions, all in response to the affidavits of defendant and in support of plaintiffs' Motion for Summary Judgment.

Please take further notice that Defendant's response to Plaintiffs' original request for admissions, its response to plaintiffs' additional request for admissions, and the
274 affidavits, depositions, exhibits, admissions, and pleadings heretofore filed herein in support of plaintiffs' motion for summary judgment are to be considered as part of plaintiffs' response to the Brief and affidavits heretofore filed by defendant.

Irwin S. Baskes and Elmer Gertz
Attorneys for Plaintiffs

Received copies of the Notice and the Affidavit and Brief referred to in the first paragraph of the above notice, this 10th day of December, 1956.

R. Tieken
Attorney for Defendant
Dated at Chicago, this
10th day of December, A. D., 1956.

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SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(Filed Dec. 10, 1956)

State of Illinois,
County of Cook—ss.

Maxwell N. Andalman, being first duly sworn, on oath deposes and says that:

1. He resides at 7020 South Jeffery Avenue, Chicago 49, Illinois, and is one of the plaintiffs herein and the agent of the other plaintiffs as a co-partner with them doing business in the name and style of Surplex Sales.

2. He is competent to testify as to all of the matters and things herein set forth. The statements made are upon his personal knowledge of facts, conversations,
302 documents and writings competent to be used at the trial of this case, he is competent to and will testify as herein set forth.

3. This affidavit supplements the affidavit, complaint and amendment thereto heretofore filed by him herein, and the said affidavit, complaint and amendment hereto are incorporated herein by reference with the same force and effect as if set forth herein in full.

4. On October 15, 1953, Haynes Stellite Company, by G. H. Shelton, its office manager, wrote to Surplex Sales with respect to their bid for approximately 53,000 pounds of cobalt powder (referred to in this affiant's previous affidavit herein), as follows:

> "We have been advised by the New York Ordnance District by telephone today that your bid has been accepted. We are arranging to ship the 5,000 pounds

immediately and will ship the remainder upon receipt of your check for same."

5. In connection with the said cobalt powder, as well as on other occasions, defendant, through its Haynes Stellite Division, relied and acted on telephone conversations with persons connected with the New York Ordnance District and did not require anything in writing in order to complete the sale and delivery of contract termination inventory.

6. At no time following the approval of plaintiffs' bids for the cobalt powder, lamp black, grinding wheels and tungsten powder by instrumentalities of the United States did the United States or any instrumentality or agency thereof deliver to the defendant or the plaintiffs any bill of sale or document with respect to title to the said cobalt powder, lamp black, grinding wheels or tungsten
304 powder other than the written approval of the plaintiffs' bids.

7. At no time prior to the filing of plaintiffs' suit herein did defendant state to plaintiffs that the said tungsten powder involved herein would not be available to them by reason of their alleged failure to make arrangements for the payment therefor.

8. Immediately following March 6, 1954 and prior to March 10, 1954 and at all times subsequent thereto including the time of the filing of the complaint herein, the plaintiffs were ready, willing and able to pay in full for the said tungsten powder in conformity with the bid therefor which had been approved by the United States and the defendant.

9. On November 19, 1953, Haynes Stellite Company, by R. W. Williams and G. H. Shelton, wrote to Surplex Sales as follows:

"There has been no release for bids on the tungsten carbide that we have in termination inventory. If and

when we are authorized to sell this material, we will so advise you making it possible for you to submit a bid."

10. Thereafter, on February 11, 1954, Haynes Stellite Company, by C. J. Dalton, Assistant Works Purchasing Agent, wrote to Surplex Sales the letter soliciting offers for the tungsten powder and other material involved herein, which letter is an exhibit attached to plaintiffs' Complaint herein and is incorporated herein by reference with the same force and effect as if set forth herein in full.

11. By reason of the said letters of November 19, 1953 and February 11, 1954, the plaintiffs relied on the 305 representation and warranty of the defendant through its Haynes Stellite Division that it had full right, power and authority to sell said tungsten powder.

12. On March 17, 1954, Haynes Stellite Company, through G. H. Shelton, its office manager, wrote to Surplex Sales as follows:

"We acknowledge your shipping instructions covering the 10,000 pounds of lampblack and the 39 grinding wheels which were awarded to you in connection with your bid of February 23, 1954.

"We are shipping these materials in accordance with your instructions."

13. With the said letters, Haynes Stellite Company sent Surplex Sales invoices in its (Haynes Stellite's) name, without reference to the United States or any instrumentality thereof, for the grinding wheels, lampblack and one barrel of tungsten powder.

14. Under date of June 17, 1954, the plaintiff's then attorneys, Andalman and Andalman, by this affiant, wrote to Mr. R. H. Gregory, Jr., the attorney for the defendant, in part as follows:

"It would be very helpful indeed if you will arrange to supply me with copies of the Haynes-Stellite contract with the government which is applicable

to the merchandise involved; that is to say, the 173,205# of Tungsten Powder. If it is not expedient for you to have this done, will you kindly supply me with such paragraphs as control the matter of sales of contract termination inventory. I am sending a copy of this letter to Mr. Shelton in the hope that one or the other can comply and conform with our request."

15. On June 18, 1954, the said attorney for the defendant wrote to this affiant as follows:

"In accordance with the request made in your letter of June 17th, I am forwarding to you herewith a copy of the provision in Haynes Stellite Company's Contract No. DA-30-069-ORD-462 with the United
306 States Government, having to do with the disposition of termination inventory. I trust that this will reach you in time to serve your needs."

16. With the said letter was enclosed a purported copy of Section 22 of the said contract, and no other part of the said contract, or of any other contract or document. No provisions with respect to partial payments or any other subject matter were included with the said letter.

17. On June 24, 1954, the attorney for the defendant wrote to this affiant, among other things, as follows:

"We do not understand, however, that a final decision to retain the powdered tungsten has as yet been made by the Government.

"In your letter to Mr. Shelton, you ask for the name of the contracting officer over whose signature notice was given to us of the approval of your bids on the cobalt powder last fall and on the tungsten powder this spring. Please be advised that in each instance the contracting officer was Mr. Henry C. Laskin.

"We are unable to advise you with regard to the methods followed by the New York Ordnance in reviewing bids submitted to us for termination inventory under our termination contract. We assume, however, that the procedures followed by the Ordnance [illegible]hose contained in the Armed Services Procurement regulation."

18. At no time from the moment the plaintiffs first bid for any contract termination inventory to and including the time of the filing of suit herein did the defendant advise the plaintiffs as to any aspect of the procedure in connection with the sale of contract termination inventory nor did the defendant, during said periods of time, advise the plaintiffs with respect to anything done or not done by it or by anyone else with respect to any Government contract.

307 19. On July 1, 1954, the attorney for the defendant wrote to this affiant as follows:

"With reference to your letter of June 28, 1954, I must advise you that the contract between Haynes Stellite Company and the United States Government for which you ask is classified information. For security reasons, I am unable to supply you with a copy.

"You may be sure that as soon as we receive instructions from the United States Government as to the disposition of the tungsten powder, I shall immediately advise you."

20. On July 19, 1954, Haynes Stellite Company, through R. W. Williams and G. H. Shelton, wrote to Surplex Sales as follows:

"Enclosed are three receipts for material which has been purchased from us.

"It is requested by New York Ordnance that we show such evidence for disposition of all inventory sold. We, in turn, request that enclosed forms be executed and returned to us.

"Thank you for your cooperation."

21. With the said letter, the following document was included by Haynes Stellite Company:

"Date .....

This is to certify that we have received from Haynes Stellite Company, A Division of Union Carbide and

Carbon Corporation, the following material sold by them to settle cancelled Government Contracts:

Product	Quantity	Unit	Unite Cost	Total Price
Cobalt Powder	51,614	Lbs.	1.50	77,571.64
Lampblack	10,268	Lbs.	.022	225.90
Grinding Wheels	39	Pcs.	3.30	128.70
Tungsten Powder	438	Lbs.	1.60	701.68

.....

.....

308 22. In all dealings by and between the plaintiffs and the defendant with respect to contract termination inventory from the time plaintiffs were first solicited to bid thereon to and including the time of filing of suit herein and beyond that date the defendant always referred to such contract termination inventory as its property and not as the property of the United States or any other third party.

23. On August 4, 1954, the General Services Administration, by Maxwell H. Elliott, its General Counsel, wrote to Surplex Sales as follows:

> "As indicated to you at the time of our meeting, we take no position with respect to this matter in so far as the rights or obligations between you and Haynes-Stellite Company are concerned."

24. On October 1, 1954, the attorney for the defendant wrote to this affiant as follows:

> "In my July 1, 1954 letter, I told you that since the contract between Haynes Stellite Company and the United States Government relating to the tungsten powder was a classified document, I was unable to supply you with a copy for reasons of national security; this disability still prevents me from complying with your request in this regard.
>
> "In compliance with the assurance given in my letter of July 1, 1954, I now inform you that Haynes Stellite Company has just received instructions from the New York Ordnance District, directing it to ship

the tungsten powder to the Government. Please be advised that we consider these instructions to be binding upon us and that we are currently making delivery."

25. The said letter of October 1, 1954 contained the first intimation received by plaintiffs that the United States had made any final decision or determination with respect to the said tungsten powder. At all times prior there to it was represented and warranted by defendant to plaintiffs that delivery was simply suspended and that the said tungsten powder was in its possession.

309

26. On October 28, 1954, the Department of the Army, through James A. Richardson, III, the Acting Chief of the Procurement Division, wrote to this affiant as follows:

"Since no privity of contract exists between your client and the Department of the Army, there is no procedure which would permit a direct appeal being filed with the military establishment."

27. On November 4, 1954, the General Services Administration, through Maxwell H. Elliott, its General Counsel, wrote to the Honorable Sidney R. Yates, whom this affiant asked to make inquiry in behalf of the plaintiffs, as follows:

"Section 415a. 1, Part 415a, Chapter IV, Title 32. CFR, contains the charter and rules of the Armed Services Board of Contract Appeals. In this respect I might mention that I feel it is extremely doubtful that this appeals procedure would apply in Mr. Andalman's case since his client's contract was with a private company."

28. Prior to the time that the plaintiffs were first advised by defendant that the Government had purportedly suspended delivery of the said tungsten powder, plaintiffs arranged for funds to pay in full the amounts owing by them to defendant for the said tungsten powder; such funds consisting of cash in the bank, moneys pledged by various

associates, a line of credit established at plaintiffs' bank, arrangements for bank loans, and sales of the tungsten
310 powder theretofore arranged. The bank line of credit and loan arrangements were subsequently confirmed in writing, a copy of which confirmation has been delivered to defendant's attorney. Some of the sales were confirmed in writing, and copies thereof shown to defendant's attorney.

29. Prior to October 1, 1956, neither the defendant nor any of its divisions nor any agency or instrumentality of the United States ever at any time made any claim or contention and never stated to plaintiffs or any of them, that "partial payment" clauses of any contact between defendant and United States had any relevancy, pertinency, connection with or application to subject matter of this litigation. Defendant, prior to the filing of this suit, at all times, gave but one reason and stated but one ground for its failure to deliver the tungsten powder in question. That one reason and one ground was that after the Government, in writing, approved plaintiffs' bid and in writing authorized defendant to release said tungsten powder to plaintiffs, it, the Government, on to-wit March 9, 1954, ordered defendant to suspend delivery to plaintiffs. Neither defendant nor the Government nor anyone else ever questioned plaintiffs' readiness, willingness or ability to pay for said tungsten powder until long after the present suit was filed.

30. On March 19, 1954, plaintiffs wrote to Haynes-Stellite Company as follows:

"We have received your letter of March 17, 1954 enclosing 'two invoices for part of the merchandise re-
311 ferred to in our previous communications dated March 16, 1954 and March 17, 1954 and in your 'Notice of Award' dated March 6, 1954.

"The merchandise received, mentioned in Invoice No. 880-1202, is referred to as a 'Lot'. This is an

obvious error as we accepted this tungsten powder as part of the merchandise we acquired under the award. We would not wish anyone to labor under a misapprehension in that regard. Actually, our bid for the material was made to average $1.304645 per pound for the 173,205 lbs. Our check for $701.68 which you received March 6, 1954 therefore overpays for the material received by $130.46. This is consistent with the program agreed upon with your Mr. Shelton by which we were to deliver on or by March 11, 1954 the sum of $115,000.00 for which you were to release immediately 49,500 lbs. of tungsten powder retaining the balance to apply on our account. This balance together with approximately another $111,000.00, under the arrangement as to terms, was to be paid you within three weeks thereafter. This, you will notice was consistent with the terms you allowed us in the Cobalt deal last October.

"The notation on the bottom of Invoice No. 880-1202-2 which notes that' handling charges will be invoiced later' is in error. We call to your attention your original letter dated February 11, 1954 offering this material to us, and your various ads in the Waste Trade Journal, specifically February 20, 1954, Page 25, in which it is specified that the terms are 'F.O.B. Kokomo Plant'.

"We are in a dilemma ourselves since we have made commitments which could result in lawsuits against us. Needless to say we are extremely anxious to avoid lawsuits for ourselves as well as your concern. We therefore expect that you will work out your peace with the Government to the end that we may obtain delivery of the material promptly.

"Please let us hear from you at your earliest opportunity."

31. No response to the said letter was received by plaintiffs at any time from defendant and particularly no denial was ever received at any time by plaintiffs from defendant as to the payment arrangements set forth in the said letter.

312 32. Defendant never at any time prior to November, 1956 stated to plaintiffs or any of them that there was any limitation upon the power or authority of either G. H. Shelton or Glenn Williams in dealing with the plaintiffs; and plaintiffs always relied upon such power and authority of the said persons. Said persons and defendant always held out said persons as duly authorized to deal with plaintiffs in connection with the subject matter of these proceedings.

Maxwell N. Andalman

Jurat

313

ORDER

(Entered Jan. 25, 1957)

This day come the parties by their counsel and present their respective motions for summary judgment and the court having heard arguments of counsel on said motions the motions are taken under advisement.

314

ORDER

(Entered Feb. 11, 1957)

Upon due consideration and the Court being fully advised having this day filed its memorandum opinion it is

Ordered that plaintiffs' motion for summary judgment be and the same hereby is overruled and denied and that defendant's motion for summary judgment be and the same hereby is allowed and it is

Further Ordered that defendant be and hereby is directed to submit proposed Findings of Fact, Conclusions of Law and Judgment order in open Court on February 18, 1957.

315

MEMORANDUM OF OPINION.

(Filed Feb. 11, 1957)

Plaintiffs and defendant have filed motions for summary judgment under Rule 56, agreeing there is no genuine issue as to any material fact between the parties, and each seeks summary judgment as a matter of law.

From a consideration of the pleadings, affidavits, briefs and oral arguments had in support of their respective contentions, the court has jurisdiction of the parties and subject matter, and it is proper this matter be decided as a matter of law by summary judgment.

The Tungsten powder in issue was classified material and the property of the United States under contracts of July 6, 1951 and February 13, 1952 between defendant and the Department of Defense.

316 Defendant, in advertising said powder for sale, was an instrumentality of the United States acting under the authority and direction of the Government Contracting Officer, who erroneously failed to screen the disposition thereof with the General Services Administration, as required by the applicable law and regulations, set forth in defendant's brief.

The burden is on the plaintiffs to substantiate the lawful acquisition of property owned by the United States. Innocent errors and illegal procedures committed by governmental employees and instrumentalities used by the United States do not inure to the benefit of others, nor may they be the basis for creating a liability against the United States or its instrumentalities or be otherwise urged as a concept for requiring the United States to complete a sale and disposition of its property in violation of the pertinent statutes and regulations. To determine otherwise would

conclude that erroneous and illegal acts and procedures be substituted for the Congressional intent and the resulting statutes.

Plaintiffs' motion for summary judgment on the law overruled and denied.

Defendant's motion for summary judgment on the
317 law allowed. Defendant to submit proposed findings of fact and conclusions of law on or before the 18th day of February, 1957.

Igoe
Judge, United States District Court.

318

NOTICE.

(Filed Feb. 18, 1957)

To: Messrs. Irwin S. Baskes
and Elmer Gertz
Attorneys at Law
120 South LaSalle Street
Chicago 3 Illinois

Please Take Notice that on Monday, February 18, 1957, at the opening of court or as soon thereafter as counsel may be heard, I will appear before Judge Michael L. Igoe, in the court room usually occupied by him in the United States Court House, 219 South Clark Street, Chicago 4, Illinois, or before such other judge who may be sitting in his place and stead, and then and there present the Findings of Fact and Conclusions of Law, copies of which were served upon you herewith, and I shall also move the court for leave to file as a supplemental exhibit certified copies of Emergency Procurement Regulation No. 1, dated August 14, 1951, and Supplement No. 1, dated March 13, 1952, and Supplement No. 2, dated April 10, 1953 thereto.

At which time and place you may appear if you so see fit.

R. Tieken
United States Attorney

Received a copy of the above
and foregoing Notice this 14th
day of February, 1957.
Irwin S. Baskes and Elmer Gertz
By: I. S. Baskes
120 S. LaSalle St., Chicago
RCB:sak

(There was presented the proposed findings of fact and conclusions of law and judgment order which are exactly as finally entered herein on March 26, 1957, and set forth in full hereinafter on pages 141 and 152, incl.)

322

OBJECTIONS OF PLAINTIFFS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ORDER SUBMITTED BY DEFENDANT.

(Filed March 4, 1957)

Now Come the plaintiffs, Rose Finsky, et al, object to the Findings of Fact and Conclusions of Law and the Judgment Order submitted to the court by the defendant, and tate

As objections to said Findings of Fact:

1. Said findings of fact and conclusions of law and judgment order are not in accord with the pleadings.

2. Said findings of fact and conclusions of law and judgment order are not within the bounds or scope of or in accord with the Memorandum of Opinion of the court.

323 3. The findings of fact disregard the facts as adduced by the averments contained in the affidavits of plaintiffs attached to or made part of plaintiffs' Motion

for Summary Judgment. The case having been disposed of on the pleadings, the averments in said affidavits must necessarily be deemed to be true.

4. Finding No. 3 which quotes only part of the partial payment provision contained in the contracts between defendant and the Government is misleading and inadequate. A complete quotation or an abstract of said provision should be included. In its entirety that provision shows that the defendant could "acquire or dispose of property to which title is vested in the Government in this clause, upon terms approved by the Contracting Officer", and shows that the defendant had or was given the right, power and authority to sell the property upon the terms approved by the Contracting Officer.

5. Finding No. 8 which quotes only part of the letter of February 11, 1954 from defendant to plaintiffs is misleading and inadequate. Said letter should be quoted in its entirety or an abstract thereof included. In its entirety that letter contains no reference to the Government or any other third party and shows that the defendant was offering the property for sale as its own.

6. Finding No. 8 should include or be preceded by a finding showing the written instructions of the Contracting Officer to the defendant to proceed to advertise and sell the property involved.

324 7. Finding No. 10 is erroneous in stating that plaintiff, Joseph M. Andalman "arranged to visit Mr. Shelton at defendant's Kokomo plant the following day, March 6". The affidavits and the depositions taken in support of the Motions for Summary Judgment show that the said plaintiff went to Kokomo to receive and take some of the tungsten powder involved.

8. Finding No. 11 that "Plaintiffs requested Mr. Shelton to permit plaintiffs to purchase or barrel of the tungsten

powder, weighing approximately 438 pounds" is contrary to and not supported by the pleadings, affidavits and depositions. The affidavits and depositions show, and the court should find as a fact, that after the parties had discussed time and manner of payment the defendant executed its written letter of award to plaintiffs and delivered to plaintiffs one of the barrels of the tungsten powder purchased by them, said one barrel being then removed by the plaintiffs to allow them to show samples thereof to their customers.

Said Finding No. 11 should also contain the Contracting Officer's written acknowledgment of Government approval of the award, such approval of the award being an instrument relating to title and transfer thereof.

9. Finding No. 12 is incomplete in that it fails to set out as a fact that the plaintiffs did not and could not have any knowledge of what the Contracting Officer did or did not do.

10. Finding No. 13 is inadequate in failing to show that the telegram to defendant and the Contracting Officer constituted a reason for defendant's failure to turn over the balance of the property to plaintiffs, and is inadequate in that it fails to show as a fact that all the other items bid for and purchased by plaintiffs were subsequently delivered and paid for in full by the plaintiffs. Said finding should also show that the defendant attempted to refund some of the money paid to defendant by plaintiffs on account of the tungsten powder purchased and delivered to plaintiffs.

11. Finding No. 14 is erroneous in stating that the tungsten powder was taken by the Government and stockpiled as material strategic and critical to the National Defense, there being no evidence in this regard. Said finding should be amended to show that subsequent to March 17, 1954, the

defendant wrote one of the plaintiffs stating that defendant had not been advised that the tungsten powder was not later to be turned over to plaintiffs, and further intended that the tungsten powder was actually in the possession of defendant for a number of months thereafter.

12. Finding No. 15, which quotes part of Section 98(e) the Strategic and Critical Material Stockpile Act of 1939 (50 U.S.C., Sec. 98(e)), as amended, should contain a complete quotation of that Section in order to show that the material must first have been determined to be strate-
326 gic and critical in the manner therein provided and to show the exemptions from stockpiling as therein provided.

13. Section 597.603-3 of the General Regulations of the Department of the Army, quoted in part in Finding No. 22 was published (as stated in said finding) on January 22, 1954, 10 months after the contracts between the defendant and the Government had been terminated and at least 2 months after the sale of the property involved had been authorized by the Contracting Officer. Said Department of the Army Regulation cannot be given and does not provide that it shall have retroactive effect.

14. Findings 15 to 25, inclusive, are objectionable and should be deleted as same are not findings of fact. They consist of series of incomplete and inadequate statutes, regulations and resolutions taken out of context, and are immaterial and irrelevant conclusions of law having no bearing on the issues.

327 As Objections to said Conclusions of Law:

1. The Conclusions of Law are not based on nor in accord with the facts nor the Court's Memorandum of Opinion, and are conclusions which could be applicable and pertinent only to the Government and not to the defendant, a private corporation.

2. Conclusion No. 2 is incorrect in concluding that by virtue of the partial payment provisions in the contracts between the defendant and the Government and by virtue of partial payments made thereunder that title to the tungsten powder was in the Government. The partial payment provisions of those contracts, to which plaintiffs are not privy and not bound, must be read as part of the entire contracts and particularly in connection with the Notice of Termination provision thereof. Under these provisions the defendant had the right to acquire the property or dispose of it as the Contracting Officer should direct. In this case the defendant was directed to sell, and it did sell to the plaintiffs.

3. Conclusion No. 3 that defendant acted only as the instrumentality or agency of the Government is without foundation and not based on the pleadings, affidavits or depositions of the parties. The defendant dealt with plaintiffs as a principal, held itself out as a principal and sold the property as a principal. The relationship, contractual or otherwise, between defendant and the Government is not binding on plaintiffs as innocent purchasers.

328 4. As to Conclusion No. 4, plaintiffs cannot be charged with knowledge of a secret agreement between defendant and any third party where defendant, as here, held itself out as the owner.

5. As to Conclusion No. 5, pursuant to Section 18 of the Uniform Sales Act, all matter before the Court, including the partial delivery, partial payment, the negotiations for payment of the balance and the execution of the award, show that it was the intention of plaintiffs and defendant that this sale was to be treated as a completed transaction.

6. Conclusion No. 6 is not available to a private corporation that entered into a contract to sell property which it claimed to own or claimed to have the right to sell. Whether the Government could have prevented the defendant from selling to plaintiffs is purely a matter between the Government and the defendant. Plaintiffs were under no obligation to and could not possibly determine what the Government or the defendant did or failed to do which might have either caused or prevented delivery of the property.

7. As to Conclusion No. 7, whether the Government was or was not obligated to deliver the tungsten is of no relevance. The plaintiffs' contract was not with the Government and the plaintiffs seek no relief from the Government. The Government is not a party, and has no standing in this case—particularly after having approved plaintiffs' bid and awarding the property to plaintiffs. "After
329 awards have been made, withdrawals cannot be effected". (Department of Army, Special Regulation No. 755-5-2).

8. As to Conclusion No. 8, whether defendant could or could not compel the Government to authorize delivery of the property to plaintiffs is not material. Plaintiffs have suffered damage as a result of defendant's failure to deliver pursuant to its agreement. Only defendant, and not plaintiffs, could know whether it could make delivery.

Respectfully submitted,

Irwin S. Baskes
Elmer Gertz
Attorneys for Plaintiffs

350

ORDER

(Entered March 4, 1957)

Upon due consideration the Court being fully advised it is

Ordered that Plaintiffs' objections to Defendant's suggested findings of fact, conclusions of law and judgment order be and the same hereby are overruled.

351

FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT ORDER.

(Entered March 26, 1957)

This cause came before the court without a jury upon a hearing and argument on the motions for summary judgment filed by plaintiffs and defendant, plaintiffs appearing in person by their attorney and defendant appearing by the United States Attorney for the Northern District of Illinois, and the court having considered the motions, pleadings, affidavits, admissions of fact and depositions offered by both parties, and the court having been fully advised in the premises, now makes and files its

FINDINGS OF FACT

1. Plaintiffs are copartners doing business under the name of Surplex Sales, a copartnership, and are all residents of the City of Chicago, Cook County, Illinois. Plaintiffs filed their complaint at law and in equity alleging that defendant, Union Carbide & Carbon Corporation, a New York corporation, through one of its divisions known as Haynes Stellite Company, at Kokomo, Indiana, breached its contract with plaintiffs under which defendant

352 agreed to sell and plaintiffs agreed to buy approximately 173,000 pounds of powdered tungsten at a purchase price of approximately $226,000. Plaintiff's com-

plaint is in four counts and seeks to recover from defendant damages far in excess of $3000, exclusive of interest and costs.

2. July 6, 1951, defendant's Haynes Stellite division entered into a Department of Defense contract with the United States Government under contract No. DA-30-069-ORD-128. February 13, 1952, Haynes Stellite entered into another such contract No. DA-30-069-ORD-462. Under these contracts, defendant acquired a certain quantity of tungsten powder in order to perform its contractual obligations with the Government. The larger bulk of the tungsten powder thus acquired was used under the earlier contract of July 6, 1951. The balance of the powder was to be used under the later contract. This balance equalled approximately 173,000 pounds and is the tungsten powder involved in this cause of action.

3. One of the provisions contained in each of these contracts provided in part as follows:

> Upon the making of any partial payment under this contract title to all parts, materials, inventories, work in process and nondurable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practices, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production * * *.

4. Another provision contained in each of these contracts provided for termination of the contract for the
353 convenience of the Government upon notice of termination delivered to the contractor specifying the extent to which performance of work under the contract is

terminated, and the date upon which such termination becomes effective. Also provided therein, among other things, was the obligation of the contractor to use its best efforts to sell, in the manner, at the time, to the extent, and at the price or prices directed or authorized by the contracting officer, all such fabricated or unfabricated parts, work in process, completed work, supplies and other material produced as a part of, or acquired in connection with the performance of the work terminated by the notice of termination.

5. Beginning January 31, 1952, and continuing until March 9, 1953, the Government made partial payments under these contracts in an amount above three million dollars. All of the tungsten powder acquired under these contracts was physically maintained separately from all other tungsten powder and materials used by Haynes Stellite in manufacturing its normal products and products under different contracts. The use of the tungsten powder in question under the government contracts in question was segregated and accounted for by the issuance of slips, posting of withdrawals to the balance of stores records and charging these withdrawals to a particularly designated process account. The particular designation identified and totalled all costs in the production of the work under the government contracts. In connection therewith, Haynes Stellite made applications to the Government for partial payments. These partial payments when received were credited to its cost in acquiring the tungsten powder in question and used in its performance under the contracts.

6. March 11, 1953, prior to completion of work under these contracts, the principal government contracting
254 officer charged with representing the Government in these contracts, Henry C. Laskin, delivered to and served upon defendant notice that the Government effective

March 11, 1953, terminated these contracts for its convenience. Thereafter, the government contracting officer directed defendant to dispose of all materials acquired by the defendant under these contracts, including the 173,000 pounds of tungsten powder in question, to advertise for and solicit bids for the sale of these materials and to sell, to the high bidder, with the approval of the United States Government, all such materials.

7. Early in February 1954 defendant paid for an advertisement in the Waste Trade Journal. This ad solicited bids for the 173,000 odd pounds of the tungsten powder in question, among other items. This advertisement appeared under a bold face caption reading "GOVERNMENT CONTRACT CANCELLATION." The ad further stated, "The Government reserves the right to reject any and all bids. Terms Cash, F.O.B. Kokomo plant." Plaintiffs were subscribers to this journal and saw this ad which appeared three times for three consecutive weeks during February.

8. February 11, 1954, Haynes Stellite wrote a letter of solicitation to Surplex Sales inviting bids on all the materials listed in the advertisement. This letter in part provided, "Terms of payment will be our option. (Cashiers check, certified check, or sight draft)."

9. February 23, 1954, plaintiffs submitted their bid on the tungsten powder in question, among other items, expressly pursuant to the ad and the letter of solicitation. Plaintiffs' written bid in part stated, "Terms of payment per your letter at your option."

355 10. February 23, 1954, Haynes Stellite notified plaintiffs that Surplex Sales was high bidder on the tungsten powder in question "and that report would be made to the Government and the plaintiffs would be notified orally and in writing if their bids were approved by the United States government." March 4, 1954, Joseph Andalman, one of the plaintiffs, discussed the question of

government approval of the high bid of Surplex Sales with Mr. Shelton, office manager and manager of accounting for Haynes Stellite. At defendant's suggestion, Joseph Andalman that same day telephoned New York Ordnance, personally talked with Mr. Van Heest of the New York Ordnance District, Department of the Army, and inquired whether the high bid of Surplex Sales for the tungsten powder in question had been or would be approved. Mr. Van Heest advised Joseph Andalman that the Board of Awards would meet the next day, and that Joseph Andalman should call tomorrow. Joseph Andalman called March 5, 1954, and was told that the Army Board of Awards had approved the high bid of Surplex Sales for the purchase of the tungsten powder in question. Mr. Shelton was present at New York Ordnance March 5, 1954, and Joseph Andalman also talked with Mr. Shelton and arranged to visit Mr. Shelton at defendant's Kokomo plant the following day, March 6.

11. March 6, 1954, plaintiffs Joseph and Maxwell Andalman visited Mr. Shelton at his Kokomo plant. Plaintiffs brought with them no money, cashiers check, certified check or sight draft in payment for the tungsten powder. Plaintiffs requested Mr. Shelton to permit plaintiff to purchase one barrel of the tungsten powder, weighing approximately 438 pounds. Mr. Shelton acquiesced and permitted 356 plaintiffs to take with them the barrel of tungsten powder, pursuant to plaintiffs' statements that they needed the tungsten powder for use as samples in contacting prospective purchasers. Plaintiffs gave Mr. Shelton their check for $701.68. This figure or amount was based upon plaintiffs' graduated bid of $1.602 per pound for the first 24,750 pounds. At that time, also, Mr. Shelton typed and delivered a letter into the hands of Joseph and Maxwell Andalman, which in part read, "This is to advise you have been awarded approximately 173,205 pounds of pow-

dered tungsten * * *." The letter concluded, "This award was granted in accordance with your bid of February 23, 1954."

An award letter, dated March 5, 1954, confirming the conversation between Joseph Andalman and New York Ordnance on March 5, 1954, was shortly thereafter mailed by New York Ordnance, signed by Mr. Henry Laskin, and received by plaintiffs. In it was stated the fact that plaintiffs' high bid on the tungsten powder had been accepted by the Government.

12. Mr. Laskin, the government contracting officer representing New York Ordnance under the contracts in question between defendant and the United States, had approved plaintiffs' average bid of $1.30 a pound for the tungsten powder in question or approximately $226,000 for the entire lot of approximately 173,000 pounds, without submitting or offering the tungsten powder to General Services Administration, in order to ascertain whether the tungsten powder was required by that governmental agency for stock piling as a strategic and critical material necessary to the national defense. Nor did Mr. Laskin submit or offer the tungsten powder to any other branch of the Department of the Army for that purpose. At no time did Mr. Laskin obtain from General Services Administration a written release authorizing the public sale of the tungsten powder in question.

357 13. March 10, 1954, defendant received by wire from New York Ordnance a communication which in substance informed defendant that the sale of tungsten powder to Surplex Sales was "suspended," and that "no deliveries are to be made whatsoever pending further instructions from New York Ordnance District. You are instructed to advise all bidders involved." Defendant thereupon transmitted this communication to plaintiffs the same day.

14. By letter dated March 17, 1954, the Department of the Army, New York Ordnance District, notified defendant to turn over to the Government, in accordance with shipping instructions to be forwarded, the tungsten powder in question. Thereafter the shipping instructions were forwarded, possession of the tungsten powder taken by the Government and the tungsten powder stockpiled as material strategic and critical to the national defense.

15. Section 6(e) of the Strategic and Critical Material Stockpile Act of 1939, 50 U.S.C., sec. 98(e), as amended, in part provided,

> Pursuant to regulations issued by the General Services Administration, every material determined to be strategic and critical * * * which is owned or contracted for by the United States or any agency thereof * * * shall be transferred by the owning agency, when determined by such agency to be surplus to its needs and responsibilities, to the stock piles * * *.

16. Section 203(f) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. sec. 484b(f), as amended, provided,

> Subject to regulations of the [GS] Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

358 17. Section 202 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. sec. 483, as amended, in part provided that the General Services Administrator "shall prescribe policies and methods to promote the maximum utilization of excess property by executive agencies, and he shall provide for the transfer of excess property among Federal agencies."

18. Section 3(g) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. sec. 472(g), as amended, defined "surplus property" and provided that before property excess to any federal agency can be de-

cleared surplus it must first be determined that it is "not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the" General Services Administrator.

19. Section 3(k) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C., section 472(k), as amended, provided as follows:

> The term "contractor inventory" means (1) any property acquired by and in the possession of a contractor or subcontractor under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (2) any property which the Government is obligated to take over under any type of contract as a result of either any changes in the specifications or plans thereunder or of the termination of such contract (or sub-contract thereunder), prior to completion of the work, for the convenience or at the option of the Government.

20. Regulations of the General Services Administrator appeared at 15 Fed. Reg. 6492 and 7767, at 44 C.F.R., 1953 Supp., sec. 55 *et seq.*, and in 40 U.S.C. App. These regulations repeated the definition of "contractor inventory," appearing in section 3(k) of the Federal Prop-
359 erty and Administrative Services Act of 1949, 40 U.S.C., sec. 472(k), as amended, provided that the disposal of surplus property shall be in such manner as to facilitate production for the national defense, authorized the disposition of contractor inventory by executive agencies under such orders and directives as the executive agency may provide, and required further that the disposal of substantial quantities of material by a contractor "shall be subject to prior approval by the contracting agency, in accordance with criteria established by that agency."

21. Section 407.606-1 of the Joint Resolutions of the Armed Forces appeared at 17 Fed. Reg. 1791 *et seq.*, and

at 32 C.F.R., 1953 Supp., sec. 407 *et seq.*, and required usable property included in contractor inventory to be screened within the Department of Defense. It provided further,

> (d) Items excess to the Department of Defense will be submitted as required by regulations of the General Services Administration to the General Services Administration for further screening; • • •.

Section 407.606-p of the Joint Resolutions of the Armed Forces in part provided,

> • • • property which must be referred by the Department of Defense Screening Agency to the General Services Administration under applicable regulations of said Administration may not be disposed of until its release in writing, or appropriate instructions for distribution within the Government, have been received from General Services Administration.

22. Section 597.603-3 of the General Regulations of the Department of the Army appeared at 19 Fed. Reg. 402, on January 22, 1954, and in part provided:

> All reportable Contractor inventory • • • shall be screened concurrently with the Department of Defense Screening Agency and with General Services Administration • • •.

360 23. Emergency Procurement Regulation No. 1, promulgated by the General Services Administration, expressly provided that tungsten powder in contractor inventory be screened for stockpiling and stockpiled as a strategic and critical material.

24. Special Regulation 755-80-50, promulgated by the Secretary of the Army, also expressly provided that tungsten powder in contractor inventory be screened for stockpiling and stockpiled as a strategic and critical material.

25. The aforesaid statutes, rules and regulations were in existence at all times material to the issues in the instant cause of action.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the subject matter of this action and the parties thereto under 28 U.S.C. sec. 1331 and 1332(a)(1).

2. Title to the tungsten powder in question was in the United States Government, by virtue of the partial payments provisions incorporated in each of the contracts between the United States Government, New York Ordnance, and defendant's Haynes Stellite division, and by virtue of the partial payments made by the United States Government to Haynes Stellite under those contracts. *E.g.*, *City of Detroit* v. *Murray Corporation of America*, 6 Cir. 1956, 234 F. 2d 380, 382.

3. Defendant, through its Haynes Stellite division acted only as the instrumentality or agency through which the United States Government exercised control and supervision over the disposition of government-owned property. Section 203(f) of the Federal Property and Administrative Services of 1949, 40 U.S.C. sec. 484(f), as amended.

361 4. Plaintiffs are charged with knowledge of the United States statutes at large, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384, and the rules and regulations of federal agencies appearing in the Federal Register, 44 U.S.C. sec. 307, and are charged with knowledge of defendant's agency in the sale and disposition of government contractor termination inventory. Defendant is therefore not a proper party defendant in this action.

5. Performance under the contract upon which this cause of action is brought was to be in Indiana, and the law of Indiana governed the contract of the parties. Parties to a contract are presumed to contract with reference to existing applicable law. Such law must be read into every contract. *Lutz* v. *New Albany City Plan Commission*, 101 N.E. 2nd 187, 190-1. Moreover, as stated in

Scott et al. v. *Federal Land Bank of Louisville, Ky.*, 175 N.E. 16, 17,

> * * * Where the subject-matter of a contract is exclusively one of national cognizance, and Congress has enacted a law for its complete regulation, the parties will be presumed to have contracted with reference to the act of Congress and its effect on the subject-matter, and not with reference to the state law.

6. Federal statutes and regulations provided that before the tungsten powder in question could be declared surplus to the needs and responsibilities of all government agencies, and thus disposed of by public sale, it should first be screened with all government agencies, and specifically the General Services Administration, in order to determine whether it was such material as should be stockpiled because strategic and critical to the national defense.

Further, these federal statutes and regulations ex-
362 pressly required that the tungsten powder in question should have been so screened and so stockpiled as material critical and strategic to the national defense. Therefore, public sale of the tungsten powder in question was not authorized and could not lawfully be made.

7. The United States Government was not obligated to authorize delivery of the tungsten powder in question to plaintiffs, and could grant such authorization only in violation of the applicable law. The Government "may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement." *Hart* v. *United States*, 95 U.S. 316, 318.

8. Defendant could not compel the Government to act unlawfully and authorize delivery of the tungsten powder in question to plaintiffs. Defendant under its contract, if any, with plaintiffs cannot be required to perform either an impossible or illegal act. *Lutz* v. *New Albany City Plan*

Commission, 101 N.E. 2nd 187, 190-1. Thus, if defendant is to be held under the contract as a principal, nevertheless impossible and illegal performance thereunder could not be imposed upon it.

9. These conclusions of law are made upon facts in the record before this court which present no genuine or tryable material issue of fact.

JUDGMENT ORDER

Plaintiffs' moton for summary judgment is overruled and denied. Defendant's motion for summary judg-
363 ment is allowed. It is therefore ordered and adjudged that judgment of not guilty be entered in favor of the defendant, Union Carbide & Carbon Corporation, owner and operator of Haynes Stellite Company, and that court costs be awarded defendant against plaintiffs.

Enter

Igoe

Judge of the United States District Court, Northern District of Illinois, Eastern Division.

Dated at Chicago, Illinois,
this 26th day of March, A.D. 1957.

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NOTICE OF APPEAL

(Filed April 22, 1957)

Notice is hereby given that Rose Finsky, Avrum Andalman, Joseph M. Andalman, Lee S. Andalman, Yetta S. Andalman and Maxwell N. Andalman doing business as Surplex Sales, the plaintiffs in the above entitled cause, hereby appeal to the United States Court of Appeals for

the Seventh Circuit from the final judgment entered in this action on March 26, 1957.

Elmer Gertz
Irwin S. Baskes
Attorneys for Appellants, Rose Finsky, Avrum Andalman, Joseph M. Andalman, Lee S. Andalman, Yetta S. Andalman and Maxwell N. Andalman.
120 South LaSalle Street,
Chicago 3, Illinois
RA 6-6116.

ABSTRACT OF DEPOSITIONS.

For discovery of G. H. Shelton, R. W. Williams and C. J. Dalton.

Taken before Thelma McGrail, Official Reporter, on 17th July, 1956, at Kokomo, Indiana, 11:00 A.M. to
2 5:00 P.M. for plaintiffs.

Present:
Elmer Gertz, Attorney for plaintiffs.
Richard Bleloch, for Robert Tieken,
Attorney for Defendant.

Present Also:
Maxwell N. Andalman, and
Joseph M. Andalman, some of plaintiffs,
Pro Se.

Stipulation filed, waiving all formalities and signatures and that interrogatories are as on cross-examination per statutes; that books and records are produced without subpoenas.

3 R. W. WILLIAMS, being sworn, testified:

The Witness: My name is Royal Williams, 46 Ridgeway, White Plains, New York, since January 15, 1956. Before, I lived at 3021 Reed Road, Kokomo, Indiana. I am employed by the Union Carbide & Carbon Corporation since January 15, 1956 and before by its subsidiary Haynes Stellite. When I left Haynes Assist-
4 ant Office Manager to Mr. Glenn Shelton. In February and March, 1954, I was Supervisor of Costs, and in the Fall of 1953, my direct supervisor was J. C. Jansen.

Whereupon Plffs' Exhibit No. 1 was introduced by agreement and so marked and is contract between New York Ordnance District of U. S. and Haynes Stellite Company No. D.A. 30-069-ORD-462.

The Witness: I have seen that contract and am
5 partially familiar with it. With respect to it I more or less administered it under Mr. Shelton's supervision. My duties were contacts with New York Ordnance on matters of disposing of property on termination, I was responsible for making application for progress payments. That sums it up. In New York Ordnance I dealt directly with head of Procurement, J. P. McShane and I dealt with head of Terminations, New York Ordnance, Mr. Christian Van Heeste. I
6 don't remember dealing with Mr. Laskin directly. I may have but don't recall. I followed an accounting theory on performance of the cost plus contract. I was responsible for maintaining our records, what we paid out and what we received and calculating our costs. We purchased materials and we made application for progress payments and would be reimbursed 75% of all our costs from New York Ordnance direct. I addressed the Chief of the New York Ordnance by a form. There was a contract termination on 462

7 (Plffs' Ex. 1). The entire contract and every part was terminated by New York Ordnance. By telegram from the Chief, on March 11, 1953 signed by Col. John S. Walker.

Mr. Gertz: Contract termination telegram Plffs' Ex. 2 so marked.

Stipulation that after suit was filed Exhibit No. 1
8 was declassified.

The Witness: We had received telephone word that we were going to receive termination notice. This is the only written notice, none prior or subsequent.

Mr. Gertz: Stipulation that Exhibit No. 2 was classified at the time filing suit and had since been declassified.

The Witness: Telegram was addressed to E. E. LeVan, President Haynes Stellite, Executive Vice-President, W. B. McFerrin, in charge of sales, R. L.
9 Lerch, R. K. Bancroft Sales Engineer, G. M. Shelton Office Manager. After Exhibit No. 2 was received directions from New York Ordnance in re Contract terminations.

Remark: Whereupon the witness produced number of documents received from New York Ordnance relating to contract termination. Arranged them in chronological order. Produced them from the defendant's files and the same were marked Plaintiffs' Exhibits 3 to 12, inclusive. By stipulation it was agreed that they were classified until after the filing of this suit.

The Witness: All these exhibits are directions from New York Ordnance to sell or dispose of termination inventory under Exhibit No. 1. I have just produced another such direction.

10 Remark: Same was marked Exhibit No. 13 and it

was agreed that this was classified until after filing of suit. Exhibit No. 13 is February 2, 1954.

The Witness: There is one other direction for the sale of cobalt which was classified until this suit was filed. Plaintiffs' Exhibits No. 8 and No. 9 are direc-
11 tions pertaining to 99% tungsten powder, subject of
12 this suit. Prior to February 3, 1954 the New York Ordnance requested shipment of 200 pounds of powdered tungsten, under, Government bill of lading, a directive, on November 3, 1953.

Remark: Document admitted as Plffs' Exhibits Nos. 14 and 14-A produced from defendant's files, which was classified before suit was filed.

The Witness: I don't remember the Government requesting possession of any of the remaining tungsten powder involved here any time prior to February 23,
13 1954. To the best of my recollection none was received. To the best of my recollection no government agency or officer, prior to February 23, 1954 requested possession of any of the involved tungsten. New York Ordnance did not request possession between February 23, 1954 and March 9, 1954. No other agency, officer or department of United States between those dates ever requested possession. On April 2, 1954 the New York Ordnance District requested possession.

Remark: The defendant then produced Plffs'
14 Exhibit No. 15 from its file. Before suit that document was classified. It was introduced in evidence. Plffs' Exhibits Nos. 14 and 14-A was introduced without formal proof.

The Witness: Between the time of Exhibit 14 and Exhibit No. 15 the New York Ordnance requested possession of the tungsten powder on March 17, 1954 per its letter.

Mr. Gertz: Let the letter be marked Exhibit No. 16 and the records show it was classified before filing of suit.

The Witness: Between November 3, 1953 and March 17, 1954 no requests were made by New York Ordnance for the delivery of the subject matter tungsten powder. Nor was request for its possession made by any other officer, agency of the United States during that period. Between those dates I suspect there were some communications from New York Ordnance with respect to advertising the tungsten powder for sale and with respect to disposition of bids. You have one there with reference to tungsten powder Exhibits No. 8 and No. 9. When we got these exhibits we acted in accordance with instructions. We advertised it for sale in local newspapers and trade journals in the Kokomo Tribune and the Waste Trade Journal dated February 13, 1954, page 85, The Kokomo Tribune that same week. The New York Ordnance Department was advised of the publication and were sent copies of each about the time of the appearance of the Ads—I believe it was sent to Mr. Christian Van Heeste. We made efforts in placing ads and sending copies to New York Ordnance to comply with government contracts and government regulations. With copies of Ads we sent covering letters. It is possible that prior to March 17, 1954, I received communications from Henry C. Laskin. I knew that he was the contracting officer. I do not know for how long before March 17, 1954. I don't remember if he was such in the fall of 1953. I think he was at the time of the sale of the cobalt powder. I have found a directive with the sale of the cobalt powder.

19 Mr. Gertz: Let this paper be marked Plffs' Exhibit No. 17. Let the record show that it was produced by the defendant from its files and it was classified on the date it bears and prior to the filing of this suit. Also that it was received without formal proof.

The Witness: In addition to the Ads we sent out letters to companies soliciting bids on the tungsten
20 powder and other contract termination inventory. About 5 or 6. One dated February 11, 1954 went to Surplex Sales. The record on the Kokomo Tribune Ad shows it ran for a period of 2 weeks starting February 8, 1954. I have found our copy of the letter to Surplex Sales dated February 11, 1954.

Mr. Gertz: This is now marked Plff's Ex. No. 18, an exact copy of the letter sent to Surplex Sales. By agreement the copy was introduced in lieu of the original.

21 The Witness: A similar or the same letters were sent to other companies. The New York Ordnance was advised of this around February 16, 1954. To the best of my remembrance copies were sent to it.

22 Mr. Gertz: Mark this Plffs' Ex. No. 19 produced by the witness.

The Witness: Requests for us to do so were made on their original, that is directions to us—for each material. I had possibly sent copies prior to March 10, 1954. We received bids from Surplex Sales pursuant to our solicitation and sent copies to New York Ordnance District February 24, 1954. Plff's Ex. No. 20-A and 20-B is a copy of letter which went to New York Ordnance.

23 Mr. Gertz: Let these be so marked, the records to show defendant produced them from his file and they were classified before suit was filed.

The Witness: Following this we received a communication from the New York Ordnance with respect thereto on March 5, 1954.

Mr. Gertz: Let Plff's Ex. No. 21 be admitted. It was produced from defendant's file.

24 The Witness: On March 6, 1954 we advised Surplex Sales in respect to Plff's Exhibit No. 21.

Mr. Gertz: Let Plff's Ex. No. 22 be admitted.

The Witness: In regard to Plff's Ex. No. 21 we have a disposal credit on account of the tungsten powder from the New York Ordnance District. Oh, no, we did not, correction. We did not get a disposal credit of $226,578.70 at any time. We did get money or credits from the United States in connection with
25 the tungsten powder. Before the contract was terminated, on March 19, 1953 we received reimbursement of 75% of the cost of all the tungsten we had on hand of 173,000 pounds, 99% tungsten which was in the
26 nature of a progress payment from United States. The tungsten costs $6.75 per pound and subsequently we received the other 25%. Payments were made from time to time. The price I want changed to $6.61. On August 24, 1953 we received $3,022,680.00 for the tungsten and other products. It could represent more than 75% or less. It was for other material and work in
27 connection with the contract and claims by sub-contractors. In December, 1953, we received $73,611.00, June 10, 1954, $1,242,996.00. That's all. We received 100% of our costs and received approximately 10% in addition, profit.

28 By Mr. Gertz: It is agreed that the defendant got its entire cost back plus an additional amount.

The Witness: This is on raw material which was not worked. No labor was involved, there was some

storing, and handling, is all. I met one of the Andal-
29 man's before March 5th, not the ones that are here, Maxwell N. Andalman or Joseph M. Andalman. It was shortly after February 11, 1954 I met Lee Andalman at this plant, Kokomo. I do not believe anyone was present beside myself. I remember we discussed the material on hand and I let them view it in the warehouse. I do not recall his asking for samples. I do not recall telling him that he could have none. The letter February 11, 1954 tells that no samples
30 will be given. I do not recall conversation with him on the subject of samples. There would be no reason to ask since he was so advised by letter. We furnished samples of tungsten to no one. The barrels were sealed when received from Electromat. Had the barrels been opened oxidation could have started. For that reason samples could not be given out. I did give Mr. Andalman an analysis of the powder. I could have shown him Haynes Stellite invoices. I could have shown him the books of the company with respect to the tungsten powder because the analysis is recorded on the book. I don't recall discussing with Mr. Dalton the giving of the analysis—or with Mr. Shelton. I had lunch with Mr. Andalman one time. I don't re-
31 member how many times for sure, I might have dealt with him on the cobalt. I have no clear recollection or remembrance whether I met him more than once, or when I met him. I have met with Joseph Andalman before today. I remember once on March 6, 1954 in Mr. Shelton's office. He and Mr. Max Andalman were there. I don't recall the conversation in detail. Prior to that date Mr. Shelton and I had been in New York Ordnance and had been in contact, or had been contacted by Mr. Andalman in reference to whether Sur-

plex Sales had been successful bidders. Mr. Shelton advised by 'phone he had received a letter from New York Ordinance advising that Surplex had been the successful bidders. It was agreed orally over the 'phone that we would be back in Kokomo the next day Saturday, and as a matter of convenience for Surplex Sales we would meet at Kokomo and discuss the award. On March 5, 1954, we were with representatives of New York Ordnance Termination Department. I don't remember if Henry Laskin was there. Christian Van Heeste, in behalf of New York Ordnance was there. I and Mr. Shelton were there in behalf of our company. I do not recall they told us to complete the transaction with Surplex Sales. We were not there for the specific purpose to receive this award. We were there on other purposes. While we were in the office of New York Ordnance we received a call from Joseph Andalman who talked over the 'phone to Mr. Shelton. He repeated the gist of the conversation to me. There might or might not have been conversation with New York Ordnance about tungsten powder following the call from Mr. Joseph Andalman. I don't recall. Yes, Plffs' Ex. No. 21 covering the tungsten powder in question is the document handed us while we were in New York Ordnance District. It was handed to Mr. Shelton. On return to Kokomo we met Joseph and Max Andalman at Haynes Stellite office, I and Mr. Shelton. I recall the gist of that conversation. They first advised they were happy to be the successful bidders and we discussed the financing. They weren't prepared to make an immediate payment; We expressed our surprise. One of the Andalmans said if they could have a letter advising of the award that the award had been made to them, they

might be able to obtain financing; they also requested that they receive a keg of tungsten in order that they might use it as samples to obtain some bids or to market the material. We then accepted their personal check for 438 pounds, one keg, which they put in the trunk of their car. There was discussion of delaying the payment and making partial delivery of the tungsten. There was reference made to the way they handled the previous purchase of cobalt. We were
35 talking about $80,000.00 when selling the cobalt, we are now dealing with material that fluctuates on the market, dealing with $200,000.00. We weren't sure we could make such an arrangement; we were to hear from them shortly whether they could get more money. There was something said as to partial payment in a certain number of days and partial delivery, I cannot state the exact terms. I recall the conversation how payments and how delivery was to be made. I believe specific dates were set for it. I recall Shelton didn't
36 make a commitment. There was some discussion about the manner in which payment was made by Surplex Sales for the cobalt, and the Andalmans suggested a similar arrangement with respect to the tungsten powder as to payments and delivery. I don't recall what they said. I don't remember what I said. I
37 said something, what I don't recall. I do not think that it is a fact that Shelton did most of the talking on behalf of Haynes Stellite. As a matter of fact I did most of the talking. I don't recall what Shelton said about payment or delivery. In connection with the sale of the cobalt our letter also asked for cash and it is right that notwithstanding that we did make
38 terms. Andalmans definitely were the successful bidders on the tungsten powder. On March 6, 1954, there

was discussion about efforts of the Andalmans to market the tungsten powder. It is possible that Maxwell or Joseph Andalman told us that as soon as they had been advised by 'phone if they had been successful they began to move heaven and earth to get customers for the tungsten powder; that they were suspending other operations and were working day and night on the matter of disposing of the tungsten powder. After our receipt of Plffs' Ex. No. 21 we heard from New York Ordnance verbally on March 9th and received a communication from the New York
39 Office on March 10th. On March 8th I received a call from New York Ordnance. I don't recall communicating with Surplex Sales with respect to the conversation on the 8th. On March 9th we received from New York Ordnance a telegram.

Mr. Gertz: Let the reporter mark the telegram which was just produced by the witness as Plffs' Ex. No. 23.

The Witness: After our receipt of Ex. No. 23 we wired Surplex Sales advising them of its contents. The document you hand me marked Exhibit No. 24 is a
40 copy of the wire I sent and is the first advice by us to the plaintiffs of the receipt of Plffs' Ex. No. 23, I believe.

40 Mr. Gertz: Mark this Plffs' Ex. No. 24 received in evidence.

The Witness: After receipt of Plffs' Ex. No. 24 I received a communication from the New York Ordnance District with respect to suspension of delivery of the tungsten powder. I have these 3 letters received after March 9, 1954 which I have just taken from our files in respect to the deliveries of the tungsten powder.

41 Mr. Gertz: Mark these Plffs' Ex. No. 25, No. 26, No. 26-A and No. 27.

The Witness: Ex. No. 25, the original thereof was sent to New York Ordnance by us. Ex. No. 25 is a correct copy thereof.

Mr. Gertz: Mark this Plffs' Ex. No. 23 received in evidence.

The Witness: We received a response from New York Ordnance to our letter of March 17, 1954. We received the government bill of lading from the General Services Administration on April 2, 1954 advising us to ship them to the Ordnance Depot at Terre Haute, Indiana.

Mr. Gertz: Please mark this Plff's Ex. No. 28.

The Witness: We have another on August 12. We had a wire to act in accordance with government bill of lading previously received.

Mr. Gertz: Mark this Plff's Ex. No. 29.

42 The Witness: The wire I just referred to is Plff's Ex. No. 29. Plff's Ex. No. 28 is the same as Plff's Ex. No. 15. To the best of my knowledge this was the first direction received by us with respect to the tungsten powder authorizing the request for the 200
43 lbs. on November 3, 1953. I just read Plffs' Ex. No. 27 dated May 17, 1954 from us to New York Ordnance and it does now refresh my recollection with respect to shipping instructions of April 2, 1954.

We were instructed by New York Ordnance to withhold shipments of tungsten powder.

Mr. Gertz: Let Plff's Ex. No. 27 be so marked and received. This was produced by Defendant from its filed and before suit was filed it was classified.

The Witness: I know the original of Plff's Ex. No. 27 was sent to New York Ordinance District. I

have with me the wire of May 12, 1954 referred to in Plff's Ex. No. 27.

Mr. Gertz: Let this Plff's Ex. No. 30 be so marked and received in evidence. It was produced by defendant from its files and was classified before suit was filed.

44 The Witness: On October 5, 1954 we shipped to Terre Haute Depot, Terre Haute, Indiana, the tungsten powder which until that date was in our possession continuously on Haynes Stellite property at Kokomo, Indiana. I have the shipping receipts with me and these are all the shipping receipts.

Mr. Gertz: Let the reporter mark shipping receipts as Plff's Ex. Nos. 31, 32, 33, 34, 35 and 36.

45 The Witness: These receipts No. 31 to No. 36 inclusive cover a total of 173,000 pounds approximately and are all dated October 5, 1954 and cover the same tungsten powder which was awarded to the plaintiffs. That is the same tungsten powder that we were directed to sell by New York Ordnance District and the same tungsten powder upon which Surplex Sales bid and on which the bid was the successful one and was the same tungsten powder referred to in Plff's Ex. No. 21 and No. 22. At no time since October 5, 1954 and subsequent to March 9, 1954 did we request the New York Ordnance District for permission to ship the tungsten powder to Surplex Sales,

46 nor did we request General Service Administration to do so, nor did we request permission of any agency of the government to do so, nor did we at any time make effort to get General Service Administration, New York Ordnance District to change their instructions with respect to suspension of delivery of tungsten powder. We were requested by Surplex Sales to

make such an effort. I recall the conversation on March 6, 1954 in the offices of Kokomo plant between Maxwell Andalman, Mr. Shelton and myself. I did not hear Maxwell Andalman ask Mr. Shelton when they
47 could expect delivery. I don't recall Mr. Shelton's comment "you give me all the money right now and you can back up all your trucks and take it out right now" but I am sure that if the money had been available at that time, the truck could have backed up and that would have been the end of it. I remember Maxwell Andalman stating that "their business wasn't that big where he carried $225,000 tucked away in his watch pocket," and I remember him saying that "he didn't have that much capital available on such short notice". I heard him remind Mr. Shelton in regard to the cobalt transaction in two parts. I heard him ask Shelton whether we could make the same arrangement because the other transaction was so satisfactory and that they have fulfilled all their commitments. I heard Mr. Andalman and Mr. Shelton discuss the best method of payment. I cannot say that Mr. Shelton
48 didn't say to Mr. Andalman "There's a lot of money involved and our position with the company must be maintained, we can go a little ways with you, but we cannot give a great extension of time". There was discussion between Mr. Andalman and Mr. Shelton about how much quantity would be delivered upon payment of so much and the payment of the balance. There was talk between Mr. Andalman and Mr. Shelton about Surplex paying over between $110,000 and $115,000 on or before the following Thursday, March 11th and that Surplex would accept 1/3rd of the merchandise. I remember hearing Mr. Andalman say that he would be there on Thursday with $110,000.00 and that he

would be ready with the rest of the money 3 weeks later. I heard Mr. Andalman say that the reason they needed 1/3rd of the merchandise shipped into the Edward Lasham Warehouse of which the Andalmans were the owners, was so that warehouse receipts could be hypothecated for borrowing the money to be paid 3 weeks thereafter. As to whether I or Mr. Shelton said "no" to that, I believe they were
49 to take that under advisement. We weren't sure whether we could agree to that or not. Mr. Andalman did not have this deal arranged with us when he left. As to who else we were going to give this merchandise to—if we had charge of it—if we weren't going to give it to Surplex Sales—say whoever could give us that money—no one else was high, but somebody else was bidding—Yes, the award was made to Surplex Sales. It was after this conversation Mr. Andalman told Mr. Shelton he could use this written award if he could get it. Mr. Shelton sat down and wrote out this award and typed it up himself. He
50 signed it and turned it over to Mr. Maxwell Andalman in my presence. I don't remember, if I heard Mr. Andalman say during the conversation and before this award was written and handed to him "ever since we knew we were the high bidder on the night of Feb. 23, 1954, we shut down our business and sought customers for the tungsten powder. Mr. Andalman could have said "many of the persons whom we contacted were waiting to get samples from Surplex Sales". I don't remember if that was the reason Mr. Maxwell Andalman came with Joseph Andalman to pick up the stuff so that samples could be sent out or if that was discussed between me, Mr. Maxwell Andalman, Mr. Joseph Andalman and Mr. Shelton. It could have been discussed over the 'phone in New York and had that

arrangement. Mr. Shelton didn't tell me after the first call on March 5, 1954 that we were going to meet for you to take merchandise out to be used as samples. Mr. Shelton and I had gone to the Ordnance Office on March 5, 1954.

51 While we were there Joseph Andalman called Mr. Van Heeste first and I do remember Mr. Van Heeste telling us about that. It is possible that I and Mr. Shelton were standing near Mr. Van Heeste when he talked to Mr. Joseph Andalman. I don't remember if Mr. Van Heeste said "Mr. Shelton is here now". I do know that Mr. Shelton did talk to a Mr. Andalman over the 'phone there. I wouldn't be surprised to know that Mr. Andalman got the information where we were from Mr. Van Heeste as he knew we were in New York. When I entertained Lee Andalman after February 11, 1954 I took him out where the tungsten

52 was stored. I showed him that and grinding wheels and graphite and other items and went to lunch with him. I imagine he discussed the difficulty he anticipated in offering the purchasers without assuring them what the analysis of the tungsten was. I showed him the analysis and the books which showed that we paid $6.61. He may have seen that. I showed him the analysis. Each of these drums had the weight and tare marked on them. That pertains to the wooden barrels as well. Each of these barrels were marked from the Electromat Co. That is the same company

53 of which Haynes Stellite is a division, and a subdivision of Union Carbide & Carbon and we dealt with each other as though we were just strangers. The $6.61 shown on the books was actually paid by one division to another. After we had delivered the tungsten powder to the government all the balance of our settlement was made with the government. At some later

date we made final reports to New York Ordnance Department and asked for the rest of our money. During all the time from March 6, 1954 and up to now, I know that Surplex Sales claims to be the owners of this tungsten powder. That is correct.

54 I recall this letter of March 17, 1954 from Surplex Sales to us which was produced from our files.

Maxwell N. Andalman: Said letter was introduced by agreement as Pltff's Ex. No. 37.

55 The Witness: In respect as to whether we communicated in any way with Surplex Sales on March 6, 1954 and March 10, 1954 our files do not indicate any letters.

Q. Mr. Maxwell N. Andalman: Mr. Williams, you have a letter dated March 19, 1954, and one March 29, 1954?

Remark: The Witness: Looks through his files and hands the papers to Mr. Andalman, and Mr. Andalman directs that one be marked Plff's Ex. No. 38.

56 The Witness: We received this letter. I don't specifically recall seeing it before. Several such came in here after March 6th and March 10th being Surplex Sales version of the transaction on paper. I recall similar letters.

Mr. Gertz: We offer in evidence Plff's Ex. No. 38.

The Witness: I know of no replies having been sent to these letters which have been sent to New York Ordnance and a copy sent to us. I just produced another letter March 10th. You had marked it Plff's Ex. 39.

57 Mr. Gertz: It is offered in evidence.

Mr. Bleloch: Objected to, self serving the same as the other one.

Mr. Gertz: Please mark these Plff's Ex. No. 40 and 40-A.

The Witness: The letter, Plff's Ex. No. 40 and No. 40-A was contained in the communication of March 10, 1954 received by our company.

Q. Mr. Andalman: We ask that these be admitted in evidence as Plff's Ex. 40 and 40-A.

57 Mr. Bleloch: Object on same grounds but no objections as to proof or foundation.

The Witness: This letter similar to the ones offered in evidence was also received by Haynes Stellite March 58 10, 1954. We got copies of communications sent to General Services Administration in New York Ordnance District by Surplex. A number of such letters were received by us in the period of March 10th to October 5, 1954. On March 6, 1954 Mr. Shelton, in the building of Haynes Stellite Company, delivered one keg of 438 lbs. of tungsten, part of this award, to Maxwell Andalman and Joseph Andalman. I wasn't present. I was present when a check was given to Mr. Shelton and Haynes Stellite cashed that check.

59 Mr. Gertz: Prior to March 10, 1954, did you call Surplex Sales attention to any regulation of General Services Administration, Department of Defense or Department of the Army?

Mr. Bleloch: You are charged with notice of regulations of governmental agencies. It's improper. I instruct the witness not to answer.

Mr. Gertz: Is it not a fact that before March 10, 1954, that you never called attention of Surplex Sales to any regulation of General Service Administration or Department of the Army or Department of Defense?

Mr. Bleloch objected on same grounds.

Mr. Gertz: I offered to prove that prior to March 10, 1954 this witness never called attention of anyone

connected with Surplex Sales to any regulation. (To witness) Prior to March 10, 1954, did you ever show Surplex Sales copy of Plff's Ex. No. 1?

60 Mr. Bleloch: Object, it was classified. If it had been shown it would have been in violation of the law.

The Witness: I don't recall ever telling anyone connected with Surplex Sales prior to March 10, 1954, about any screening of tungsten powder. That can be assumed as a fact.

61 *Examination of Witness by Richard C. Bleloch, attorney for defendant.*

The Witness: Neither in a conference March 6, 1954 nor at any time did I or Mr. Shelton say that we would accept $115,000 on March 11, 1954 and $110,000 within 3 weeks thereafter or that we would accept anything less than payment of the full amount in cash.

62 MR. C. J. DALTON who being sworn testified:

Examination by Mr. Gertz.

The Witness: My name is C. J. Dalton. I live at 2425 South Washington Street, Kokomo, Indiana. I am Assistant Works Purchasing Agent of Haynes Stellites. I have been associated with them since January 1, 1937, and was so associated in the fall of 1953. That was my job in February 1954. This involved procurement and disposal of all raw materials and I worked under the supervision of S. P. Davis.

63 The original of Plff's Ex. No. 18 was signed by me and was sent to Surplex Sales by direction of Royal Williams. The terms of Ex. No. 18 were determined on the basis that I had previously advertised material. The pattern was similar in every case. I don't recall

64 giving instructions or authority with respect to sending out the letter or the language of it. Mr. J. Andalman had previously answered ads. He also notified Williams that he would like to bid on this material. I don't remember ever meeting him at any time nor Mr. Maxwell Andalman. I remember meeting a Mr.
64 Andalman, I don't remember that his name was Lee or not. I don't remember when I met him in my office. I think before February 11, 1954, before that
65 letter. Mr. Andalman was by himself. He was waiting on Mr. Williams to see him. We discussed the cobalt situation. He asked if there was other material to be sold and I told him to see Mr. Williams. There was nothing said about samples of tungsten powder. I don't recall conversation in which its analysis came
66 up. I had one telephone conversation. Shelton and Williams were in New York and Andalman called and asked if I had heard anything. I said, "no, you would have to get in touch with Mr. Shelton in the Ordnance Department in New York" and that was on Thursday or Friday, the 4th or 5th of March, 1954. I cannot say which Mr. Andalman talked to me but he was connected with the Surplex Sales. After letter of February 11, 1956 Ex. No. 18 I did not see Mr. Lee Andalman in the presence of Mr. Williams and Mr. Shelton subsequent to that. I cannot give you the date exactly but it was on one occasion. I do not know approximately when it was I wasn't present in any conversations or when any tungsten powder was taken by Surplex Sales.

Mr. Maxwell Andalman Took Up The Questioning:

The Witness: When anybody comes into see me or comes into the plant, they register at the receptionist's desk; they give their name and state the person they want to see. If those records show Lee An-

dalman registered to see me it would not refresh my
68 my recollection? It is possible that I put him in touch with Mr. Williams after we wrote this letter. I don't recall Lee Andalman and Williams returning to me to get permission to look at the records to show analysis of the tungsten powder. I signed a letter saying that no samples were to given out. My position covers not only purchases but sales of raw material. All of the items mentioned in our letter were within the purview of my authority. In sending the letter I acted upon the authority of Mr. Williams. He had authority over me and I accepted his instructions with regard to the letter sent Surplex Sales. I do not recall Mr. Andal-
69 man asking for a sample. I do not know if Mr. Andalman was talking to Mr. Shelton that day.

Mr. Gertz Resumed Examination.

I do not remember Mr. Andalman showing me a letter of February 11, 1954, Plff's Ex. No. 18 which he held in his hands on one occasion. I don't recall his saying that he was at the plant to inspect material. I do not recall asking Williams to step in while Mr. Lee Andalman was present in my office.

70 GLEN H. SHELTON, sworn, testified as follows:

Examination by Mr. Gertz.

The Witness: My name is Glen H. Shelton, 225 South McCann, Kokomo, Indiana. I have been associated with Haynes-Stellite, a division of Union Carbide & Carbon Corporation since 1948. I am connected with it as Manager of Accounting. I have served so for about a year. In the fall of 1953 I was Office Manager and I was such in February and March 1954, and among my duties was Supervisor of Purchasing.
71 Stores, Shipping, Payrolls and Accounting. Dalton reported directly to Works Purchasing Agent who, in turn, reported to me. They were under my supervi-

sion. Williams was in a similar position and in turn reported to Jansen, Works Accountant, and he reported to me. Both were under my general supervision. I was generally in charge of all materials in connection with tungsten powder involved in these proceedings. I was present during the questioning of Mr. Williams and Mr. Dalton and heard questions put to them. In general, my answers would be similar. Maybe there are two questions put to Mr. Dalton that might have been different in regard to the Attendance Sheet
72 or Visitor's List. I am familiar with Plaintiff's Ex. No. 1 and No. 2 and was when they were sent us. I am familiar with all of the documents marked Plff's Ex. No. 8 to No. 40 and saw them when they were received. They were sent out under my general supervision. I saw Plff's Ex. No. 37, No. 38, No. 40 and No. 40-A and other similar letters from Surplex Sales. In addition I had conversations with Maxwell Andalman and Joseph Andalman on the subject of the sus-
73 pension of the delivery of tungsten powder. I don't recall I talked by long distance 'phone to Joseph Andalman on April 14, 1954 at 4:15 P.M. I do recall suggesting to him a conference on the tungsten powder with representatives of our company, Surplex Sales and the government agency involved. I do not recall if he stated Surplex Sales was not prepared to go into any conference if it is presumed that they had knowledge that the sale of tungsten powder was in violation of any governmental regulation. They couldn't make it at that time because Maxwell Andalman was
74 ill and it was postponed. I couldn't possibly know what Surplex Sales knew about any government regulations being violated. I don't recall telling him that we didn't know of any such regulations that has been

violated. When I gave Maxwell Andalman's Plff's Ex. No. 22 on March 6, 1954, I did not know of any government regulation that has been violated. No one connected with New York Ordnance District told me at that time that government regulation had been violated. Nor did I make inquiry. I was under the impression that all pertinent regulations had been followed so that at the time I gave him Ex. No. 22, I believed that our company had followed all required
75 regulations. I believed that we had been acting at all times under valid instructions under the contracting officer. I did not know that any regulation might have been violated by anyone. I had no inkling. In advertising the tungsten powder I was under the impression
76 that we were proceeding right. We followed the same procedure in advertising that we did when we disposed of the cobalt. I believe that it is correct to say that Surplex in dealing with us followed the same procedure as they did in the cobalt. I would say, "yes," I think they did. When on March 5, 1954 I talked with Mr. Joseph Andalman by long distance telephone in the office of Mr. Van Heeste, I told him that I had been advised by New York Ordnance that they awarded the tungsten to Surplex Sales. In turn he asked if we could make arrangements to meet at the plant in order for them to pick up a 400 lb. barrel of the material and I told him we were not open but if necessary we would meet them. Mr. Van Heeste was standing nearby and probably heard the conversation. Imme-
77 diately prior thereto Van Heeste handed me the approval of the award. At that time neither Van Heeste nor anybody else told me that there was anything else we had to do before we turned over the tungsten powder to Surplex Sales. At that time, it was my understanding that all we had to do was to complete

arrangements with Surplex Sales for the payment of tungsten powder. Prior to March 10, 1954 we had correspondence, communication from Mr. Henry C. Laskin. I do not recall that I talked with him or met him before that time but I understood that he was the Contracting Officer and that we were obliged to follow his instructions and directions. We were under
78 the impression we were proceeding correctly. Prior to March 10, 1954, we were not told by anyone connected with General Service Administration or New York Ordnance of any limitations upon authority of Mr. Laskin. As to if I knew of any limitation as to his authority, I was not familiar with their organization or the responsibilities of its people.

Mr. Maxwell Andalman Took Up the Questioning:

The Witness: In my capacity and in the discharge of my duties, I had general charge of the disposition of contract termination of inventory on government contract in 1953 and in October 1953. I know that Mr. Laskin signed the approval of the award and disposi-
79 tion of the cobalt to Surplex Sales on high bidding.

Mr. Bleloch: Object. Anything about cobalt has no place here. Asked that the answer be stricken.

The Witness: As to if I ever at any time advised Surplex Sales or anybody connected with it of any limitations of authority on the part of the governmental officer to approve the award, either cobalt or tungsten, I say I am not familiar with job responsibilities and couldn't advise you. As to my knowledge of limitations of the people we were dealing with acting on behalf of the government like Mr. Laskin and Mr. Van Heeste, I say I didn't have complete knowledge
80 of the scope of their responsibilities or limitations in their respective jobs. We knew Mr. Van Heeste had

some limitations on correspondence that he could sign because some of it was prompted by Van Heeste that would have to be signed by the contracting officer. I was not familiar about limitations upon the authority of Mr. Laskin. We were acting—following his in-
81 structions in disposing of inventory. We believed that he had the right to instruct us and we had the right to follow instructions. We did not know that any checking was necessary in any way to determine whether or not Mr. Laskin was proceeding properly in respect to us in connection with approval of bids or disposing of inventory. I would say that I have a good deal of experience with contract termination inventory for a considerable period prior to March 10, 1954 in smaller terminations. Most of our terminations we were sub-contractors and we got the directions from the prime contractors. Wherever we were the prime contractors as in this instance, we proceeded on direction from the contracting officer without questioning his authority at any time.

82 *Examination by Richard C. Bleloch for Defendant.*

Q. On March 6, 1954, did you or any representative of Haynes Stellite in your presence ever say to Maxwell Andalman that you were willing to accept payments in installments rather than in cash?

Mr. Gertz: Object.

The Witness: We did not. I did not nor did any other representative of Haynes Stellite on March 6, 1954, or at any other date say to Mr. Andalman that
82 we would be willing to accept $115,000 by March 6, 1954 and $110,000 within 3 weeks thereafter.

Mr. Maxwell Andalman: Actions speak louder than words.

The Witness: Mr. Bleloch, did you at any time, either on March 6, 1954, or at any other date ever state to Mr. Andalman or any of the other Andalmans that you would accept anything less than the full amount of the bid?

Mr. Andalman: That's not an issue in this case.

83 The Witness: There was no such statement.

Mr. Bleloch: On March 6, 1954 did Mr. Maxwell Andalman offer to pay the entire amount of the bill?

Mr. Maxwell Andalman: That is not proper.

A. No sir, he did not.

Q. Did he ever at any time tender to you, or to any representative of Haynes Stellite a check, a certified check, money order or sight draft for the full amount of this bid?

Mr. Andalman: That's not in issue.

A. He did not.

Examination taken up by
Mr. Gertz again.

The Witness I don't think Mr. Andalman exhibited to me a credit commitment from a Chicago bank for $150,000. I don't recall it being exhibited at a meeting in New York with any representatives. There was some discussion on finance. I don't recall if he

84 exhibited such commitment at that time or told us he had the balance of the funds in cash. All these conversations took place after Mr. Andalman had been notified we couldn't deliver the goods.

Mr. Maxwell Andalman then took
up the Examination.

The Witness: On March 6th Mr. Andalman did appear at Haynes Stellite and I personally delivered one barrel of this tungsten powder and took a check made

out in this graduated bidding for the higher amount of the bid. In August, 1954, I attempted to refund by check of Haynes Stellite in the sum of $130.00 on that barrel of tungsten.

85 On March 6, 1954, I met with Maxwell Andalman, and Joseph Andalman in my office at Haynes Stellite at the Gate House and I escorted them through the guards. Later Mr. Williams came in. I discussed with Mr. Maxwell Andalman the question of financing the transaction and then sat down and wrote out this award, Plff's Ex. No. 22 myself. At the time I re-
86 ceived a check for some $700.00. Mr. Maxwell Andalman was to return to Chicago to see what arrangements he could make with reference to financing and to contact us further. The approach Mr. Maxwell Andalman made was that they would pay between $110,000 and $115,000 on March 11th and by March 31st they would pay the balance, that's correct, Mr. Andalman told me they would not expect us to turn over one-half of the merchandise but would be satisfied to receive one-third of the merchandise, he said that they would be satisfied to receive a lessor amount. It was also said that they wanted to place it in keeping of Edward Lasham Company so that they could get warehouse receipts issued by the company in order to hypothecate them to raise the balance of the money to pay in the succeeding three weeks thereafter. On
87 the morning of March 10, 1954, I could have made a long distance call personally to Surplex Sales. It is possible. On March 9, 1954 we were called by the contracting officer, Mr. Laskin and I thought we sent you a copy of the Surplex Sales wire the following morning. It is possible I talked to Maxwell Andalman and advised him and read this telegram we received from New York. It is possible that Maxwell Andalman

asked us to send a wire or a letter both so that they would know what was in that telegram so that they could act on it. We did send a wire that same day.
88 At that time, I did not ask Mr. Andalman for $226,000. It is possible that I would have said that we would not deliver the merchandise until matters were straightened out with the government. The solicitation for bids specified cash payment. As to if I ever at any time up to and including March 10, 1954, said or wrote to Surplex Sales that we would not deliver the merchandise, tungsten powder, or the rest of it because of non-payment, I repeat the only writing we had in reference to payment was the solicitation to Surplex Sales for bids which specified Cash Payment. Mr. Dalton sent that with my permission, that's cor-
89 rect. He had my authority and approval. As to whether that was the first submission of the tungsten in question, I don't recall whether the ad came out first. This is February 11th, and ads come out on 13th and 20th in Kokomo Tribune. The letter specified the merchandise and described it the same as the ads. The letter set out the terms as Cashier's check, certified check and sight-draft. It says, Terms of payment, optional. These Terms of payments are certified check, cashier's check, or sight draft.

Q. Mr. Andalman questioned the fact of the matter in refusal and failure to deliver to Surplex Sales never arose because of non-payment. Search your soul, tell me, Mr. Shelton.

Mr. Bleloch: Object.

Q. Isn't it the fact your refusal was because of governmental interference?

The Witness: Terms of agreement were never agreed upon. We had to agree on terms before we

could make delivery. Until March 10, 1954, when we sent this telegram, copy of Laskin's telegram, we had no idea of not turning over this merchandise upon
90 payment by Surplex Sales. I did not know what financial arrangements would be made until you returned to Chicago. They were not already worked out. There were contacts made by Union Carbide and Haynes Stellite to get a meeting with Surplex Sales and New York Ordnance in our presence. After Mr. Andalman recovered from pneumonia a meeting was held in New York office of Haynes Stellite in Union Carbide & Carbon building. Mr. Luzear of the Army
91 Ordnance, Legal Representative, was present. I cannot recall if he asked Mr. Maxwell Andalman about Surplex Sales ability to pay for this merchandise. I can't recall Mr. Andalman exhibiting to him a letter from the bank stating that they were ready to advance $150,000 to Surplex Sales. I couldn't say that it wasn't made. I can't recall exactly if Mr. Andalman said the company had available the balance of a quarter of a million dollars. There was some discussion on the financing and that was subsequent to
92 March 10, 1954. We had some long distance conversations. If every time I talked to them they told me that they would insist upon delivery of the merchandise upon payment, you did express that desire. I cannot say in every conference but they did convey that. We did have some correspondence with the gist of that thought conveyed, as well as conversation that if Haynes Stellite turned the merchandise over to anyone except to Surplex Sales they did so only at their peril.

93 Certification by Thelma McGrail, Court Reporter, dated 23rd day of July, 1956.

Excerpts from Plaintiff's Exhibit 1—The contract of Feb. 13, 1952, between U.S.A. and defendant.

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22. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT.

(a) The performance of work under this Contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be affected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall (1) stop work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services or facilities except as may be necessary for completion of such portion of the work under the contract as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (4) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title and interest of the Contractor under the orders and subcontracts so terminated; (5) settle all claims arising out of such termination of orders and subcontracts, subject to the approval or ratification of the Contracting Officer, which approval or ratification shall be final for all the purposes of this clause; (6) transfer title and deliver to the Government, in the manner, at the times, and to the extent,

if any, directed by the Contracting Officer, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government; (7) use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in provision (6) of this paragraph, provided, however, that the Contractor (i) shall not be required to extend credit to any purchaser, and (ii) may keep any such property at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

(e) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termi-

nation, unless one or more extensions in writing are granted by the Contracting Officer upon request of the Contractor made in writing within such one year period or authorized extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer shall determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination.

(d) Subject to the provisions of paragraph (c), the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit, but only on work done in connection with the terminated portion of the contract. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Such amendment shall be final and conclusive upon the Contractor and the Government. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the contractor by reacon of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Government, but without duplication of any amounts agreed upon in accordance with paragraph (d), shall pay to the Contractor the amounts determined as follows:

(1) For completed supplies accepted by the Government and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(2) The total of—

(i) The costs incurred in the performance of the work terminated, exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e) (1) hereof.

(ii) The cost (which may include a reasonable allowance for profit to subcontractors or vendors, but only on work done in connection with the terminated portion of any subcontract or order) of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b) (5) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts should be included in the costs payable under (i) above), provided that—

(A) Each such claim has been settled with the written approval of the Contracting Officer; or

(B) If a final judgment has been rendered against the Contractor, or a subcontractor or vendor, by a court of competent jurisdiction determining the liability of the Contractor, subcontractor or vendor with respect to any such claim, the Contracting Officer has determined that such judgment or a part thereof is allo-

cable to the terminated portion of the Contract.

(In order for a judgment to be allowable under this subparagraph (ii), the Contractor, or subcontractor or vendor concerned, must have given the Contracting Officer prompt notice of the initiation of the proceedings in which such judgment was rendered and offered in writing to give the Government complete control of the defense of the proceedings, and must have diligently defended the suit or, if the Government has assumed control of the defense of the proceedings, must have rendered such reasonable assistance as has been requested by the Government. If such judgment includes amounts for loss of anticipatory profits or consequential damages, such amounts will not be allowable under this subparagraph.)

(iii) A sum equal to 2% of that part of the amount determined under (i) which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8% of the remainder of such amount, but the aggregate of such sums shall not exceed 6% of the whole of the amount determined under (i) above.

(3) The reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of termination inventory.

The total sum to be paid to the Contractor under (1) and (2) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in paragraph (e) (1) and paragraph (e) (2) (i), any amounts allocable to or payable in connection with property which is destroyed, lost, stolen or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b) (7).

(f) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes", from any determination of the amount to the Contractor made by the Contracting Officer under paragraph (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of that amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken the amount finally determined on such appeal; any such determination being final and conclusive upon the Contractor and the Government.

(g) In arriving at the amount due the contractor under this clause there shall be deducted (1) all unliquidated advance or other unliquidated payments on account theretofore made to the Contractor, (2) any claim which the Government may have against the Contractor in connection with this contract, and (3) the agreed price for, or the

proceeds of sale of, any materials, supplies or other things kept by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(h) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(i) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6% per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government.

(j) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the Cost Principles set forth in Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make

available to the Government at all reasonable times at the Officer of the Contractor, but without expense to the Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or to the extent approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions thereof.

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27. MILITARY SECURITY REQUIREMENTS

(a) The provisions of the following paragraphs of this clause shall apply only if and to the extent that this contract involves access to classified matter, which as used in this clause shall mean information or material classified "Top Secret", "Secret", "Confidential," or "Restricted."

(b) The Contractor (i) shall be responsible for safeguarding all classified matter and shall not supply or disclose classified matter to any unauthorized person, (ii) shall not make or permit to be made any reproductions of matter classified "Top Secret" except with the prior written authorization of the Contracting Officer, (iii) shall not make or permit to be made any reproductions of matter classified "Secret," "Confidential," or "Restricted" except as may be essential to performance of the contract, (iv) shall submit to the Contracting Officer, at such times as the Contracting Officer may direct, an accounting of all reproductions of matter classified "Top Secret," "Secret", or "Confidential," and (v) shall not incorporate in any other project any special features of design or construction which will disclose classified matter, except with the prior written authorization of the Contracting Officer.

(c) Except with the prior written consent of the Secretary or his duly authorized representative, the Contractor

(i) shall not permit any alien to have access to classified matter, and (ii) shall not permit any individual to have access to matter classified "Top Secret" or "Secret."

(d) The Contractor agrees (i) to submit immediately to the Contracting Officer a complete confidential report of any information which the Contractor may have concerning existing or threatened espionage, sabotage, or subversive activity, (ii) to submit to the Contracting Officer, upon written request, any and all information which the Contractor may have concerning any of its employees engaged in any work at any plant, factory, or site at which work under this contract is being performed, and (iii) to exclude from its plant, factory, site, or part thereof, at which work under this contract is being performed, any person or persons whom the Secretary or his duly authorized representative, in the interest of security, may designate in writing.

(e) The Contractor is authorized to rely on any letter or other written instrument signed by the Contracting Officer, changing or entirely removing the classification of this contract or of any classified matter.

(f) The obligations of the Contractor under this clause shall be in addition to any obligations of the Contractor to comply with all the terms and provisions of any applicable security or secrecy agreement heretofore or hereafter entered into between the Contractor and the Government.

(g) The Contractor agrees to insert, in all subcontracts hereunder which involve access to classified matter, provisions which shall conform substantially to the language of this clause, including this paragraph (g); provided, that such provisions need not be included in any subcontract as to which the Contracting Officer shall consent to the omission of such provisions.

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33. PARTIAL PAYMENTS (App 7-150.1)

Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.

(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract Provided, that such partial payments shall not exceed 75 per cent of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments if any, made under this contract, exceed 80 per cent of the total contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and nondurable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price

therefore a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this clause will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this clause, upon terms approved by the Contracting Officer: Provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the clause of this contract entitled Termination for Convenience of the Government and applicable laws and regulations. The agreed price (in case of acquisition by the Contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the Termination for Convenience of the Govern-

ment of this contract and applicable laws and regulations. Upon liqudation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this clause shall vest in the Contractor.

(e) The clause of this contract captioned "Liability for Government-Furnished Property" and any other provisions of this contract defining liability for Government-Furnished Property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this clause. The provisions of this clause shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provisions for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments clause any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Clause of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Clause, and shall thereafter be withdrawn only pursuant to such provisions.

• • •

PLAINTIFF'S EXHIBIT NO. 2

124 NY KOK 4-23-56

Mr. R. H. Gregory Law Department

Per phone conversation this morning here is the copy

Copy of Western Union Telegram

To Messrs. E. E. Levan
W. B. McFerrin
R. L. Lerch Restricted
R. K. Bancroft
G. H. Shelton

" 1953 Mar 11 PM 6 20 —

NA 231 Long Govt PD-NVE New York NY 11 521P-
Haynes Stellite Division, Union Carbide &
Carbon Corp-DLR 30 East 42 St—

In reply refer to Order-LG-L 4509. Your contract number DA-30-069-ORD-128 DA-30-069-ORD-462 and DA-30-069, ORD-703 are hereby terminated in their entirety except for the portion herein after directed to be accomplished, such terminations are pursuant to Clause 22 of said contracts and are effective immediately, with the following changes hereby directed to be made under the changes articles of the respective contracts. You are directed to (A) replace rotating bands on all accepted and unaccepted projectile assemblies with 6.3 GMS C C sintered iron (B) band all carriers for which there are complete sets of metal parts with 6.3 GMS per C C sintered iron (C) assemble cores to available carriers after rework specified in (B) above and conduct complete acceptance testing immediately stop all work, terminate subcontracts and place no further orders except to extent necessary to perform any portion thereof not terminated hereby or that you or a subcontractor wish to retain and continue

for own account any work in process or other materials. Telegraph similar instructions to all subcontractors and suppliers, letter and instructions follow—

Colonel John S. Walker Contracting Officer
New York Ordnance District 180 Varick St. NYK"

(3-12-53)
G H Shelton

PLAINTIFF'S EXHIBIT 8.

All communications should be addressed. In Duplicate,
Feb. 1 1954

GWKerrigan/rb/368

DEPARTMENT OF THE ARMY
New York Ordnance District
180 Varick Street
New York 14, New York

In reply refer to:

ORDEH—ID-T 160/(DA-30-069) 462
Haynes Stellite Company
A Division of Union Carbide & Carbon Corp.
725 South Lindsay St.
Kokomo, Indiana
Attention: Mr. G. H. Shelton

Gentlemen:

Contract DA-30-069-ORD-462

Reference is made to the termination inventory submitted by your company on reference contract, and listed on the following schedule:

DD Form 542, Schedule A—Items No. 7- 173205 lbs. Tungsten

It has been determined that the above item be disposed

of as salvage by sale on a competitive bid basis in accordance with the following instructions as outlined in ASPR, Section 8-608.2 (D).

a. Bids must be solicited from prospective bidders in accordance with ASPR, Section 8-608.2, since the acquisition value of this material is in excess of $25,000. A notice of the proposed sale must be published in a newspaper of general circulation in the locality in which the property is located. Requests for bids must show closing date and hour when all bids must be in. However, if your company desires to submit a bid, this bid must be mailed to this office immediately, or at latest before the closing date effective in your request for bids.

b. You will maintain a log of the above mailings.

c. You will allow an adequate time interval between mailing and receipt of bids to permit an inspection of the material and time for submission of bids.

d. If material is to be sold as salvage, all items must be listed.

e. All bids from prospective bidders must be in writing and submitted in duplicate. Bids must be opened at the date and time specified in the request for bids.

f. One copy of each bid must be submitted to New York Ordnance District together with a copy of your log showing the mailings. Copies of negative bids must also be submitted to New York Ordnance District. The aforementioned copies must be accompanied by a cover letter from your company.

g. The Property Disposal Officer will evaluate the bids and notify you as to the successful bidder by Contracting Officer's letter.

h. All sales will be made on a cash basis. Any credit extended to the successful bidder will be submitted to the Property Disposal Officer, New York Ordnance District.

j. Copies of signed receipts for all material picked up by the successful bidder will be submitted to the Property Disposal Officer, New York Ordnance District.

j. The Property Disposal Officer must be advised when the sale is completed, material removed, and of the final dollar value of the sale. This information is required for a complete analysis of this termination action.

Close adherence to the above will expedite the disposal of your inventory and enable the New York Ordnance District to complete final settlement in an expeditious and favorable manner.

For The Deputy District Chief:

Sincerely yours,
Christian Van Heest
Christian Van Heest
Assistant

PLAINTIFF'S EXHIBIT 9.

All communications should be addressed. In Duplicate,
Feb 13 1954

GWKerrigan/rb/368

DEPARTMENT OF THE ARMY
New York Ordnance District
180 Varick Street
New York 14, New York

In reply refer to:

ORDEH—ID-T 160/(DA-30-069-) 462
Haynes Stellite Company
A Division of Union Carbide & Carbon Corp.
725 South Lindsay St.
Kokomo, Indiana
Attention: Mr. G. H. Shelton

Gentlemen:

Contract DA-30-069-ORD-462

This letter is in reference to letter from this office dated 29 January 1954, in which disposal instructions were listed for disposition of 173,205 pounds of Tungsten listed as Item #7 on DD Form 542, Schedule "A".

It should be noted that paragraph "h" is incorrect. The correct wording should read as follows:

h. "All sales will be made on a cash basis. Any credit extended to the successful bidder will be at your own risk."

If any further information is required, do not hesitate to call this office.

For the Deputy District Chief:

Sincerely yours,
Christian Van Heest
Christian Van Heest
Assistant

PLAINTIFF'S EXHIBIT 15.

Form 460 January 1953

General Services Administration
Emergency Procurement Service
Washington 25, D.C.

SHIPPING INSTRUCTIONS

Address inquiry regarding these Instructions to the undersigned for the attention of:

A. R. Johnson
RE:7-7500 Ext. 4000

1. Date 4/2/54 Restricted
2. NSP-34-W
Reporting Agency No. 125-
ORDEH IDOPD-1

4. Vessel
5. Date due
6. Custom formalities will be attended to by:

3. To: New York Ordnance District
180 Varick Street
New York 14, N.Y.

Attn: Mr. D. T. Freilich, Prop. Disposal Officer

7. Following are Instructions for shipment against above contract from
Haynes Stellite Co., Kokomo, Indiana
8. Consign to:
General Services Administration
Emergency Procurement Service
Care of: Commanding Officer
Terre Haute Ordnance Depot
Terre Haute, Indiana
Auth. SMSA No. TA 7-2 GS-30403-A
9. Route Motor Express Inc. of Indiana
10. Route Order No. 27888
11. Type of equipment required:
Trucks, clean and sound
11A Each shipment should be loaded in accordance with carrier's rules and regulations including observance of applicable car load mimimum.
12. Rate of shipment Monday thru Friday, exclusive of holiday: 2 Trucks daily
12A Trucks delivery hours, Monday to Friday inclusive 8:30 am to 3:00 pm
13. Description of material (including total units and weights)
Tungsten packed in metal drums weighing 201,800 Lbs. net, as follows:

Item 1. Tungsten, 94%, Lampblack 6% weighing 15,000 Lbs. net.

" 2. Tungsten, 80%, Lampblack 4.8% Cbbalt 15.2% weighing 13,300 Lbs. Net.

" 3. Tungsten, powdered, carbon reduced 99% Tungsten weighing 173,500 Lbs. Net.

(Available immediately)

14. Special Instructions

A. To be shipped in sound containers to prevent leakage.

B. Use one B/L for each day's outloading.

C. Protect truckload minimum weight of 30,000 Lbs.

D. Trucks to be weighed light and heavy. Weight Certificates to be distributed as per attached GSA Form 429.

Shipping marks as shown in the contract or as modified by the administration must be applied to the packages/containers and must be reproduced (including above contract number) on all shipping documents and invoices.

Packing instructions as provided in the contract or as modified by this administration must be followed.

Completion and distribution of government bills of lading and other documents as outlined in the attached instructions must be strictly adhered to.

In no case are these instructions to be construed as authority to ship until notification is received from the inspection division of the administration advising that the material has been released.

Enclosure:

Document Instructions, GBA Form 429

Government Bill of Lading GS- 277055 thru GS- 277057

Approved:

B. L. Lloyd

For J. E. Salisbury

Director Storage and Transportation Division
Distribution of Copies

2 Consignee: Upon receipt of material submit receiving report, GSA Form 131, in quadruplicate

Official file (surname)
2 Inspection div.—origin—Chicago
2 Inspection branch—Wash. SACM inventory section
3 Storage branch spa— 318
Reading file (section)
ABJ:fb

PLAINTIFF'S EXHIBIT 16.

All communications should be addressed. In Duplicate
Mar 23 1954 GHS

DEPARTMENT OF THE ARMY

New York Ordnance District
180 Varick Street
New York 14, New York

In reply refer to:

ORDEH—IG 160/(DA-30-069)462
Haynes Stellite Division
Union Carbide & Carbon Corp.
30 East 42nd Street
New York 17, New York

Gentlemen:

Reference is made to letters of this office, dated 5 March 1954, in connection with the approval of the disposition of items of termination inventory to Surplex Sales in the

amount of $226,570.70 and Metals & Residues, Newark, N. J., in the amount of $17,439.60.

You are directed to turn over to the Government, in accordance with shipping instructions which will be forwarded to you in the immediate future, the following material covered by the above letters of 5 March 1954:

Item 1—13,818 lbs. 80% Tungsten Content
Item 2—15,248 lbs. 94% Tungsten Content
Item 10—173,205 lbs. Powdered Tungsten Carbon Reduced 99% Tungsten

You are also directed to turn over to the Government, in accordance with shipping instructons to be furnished to you in the immediate future, the following:

47,200 lbs. Powdered Tungsten Carbon Reduced, located at Niagara Falls, New York

In the event any agreements relating to the sale of the aforesaid property have been entered into you are directed to cancel or rescind such agreements with respect to any of the property still in your possession.

Pursuant to Armed Services Procurement Regulation 8-606.2 the referenced material may not be disposed of without approval by General Service Administration. General Service Administration has not approved this disposition of property and, accordingly, this office cannot permit you to dispose of such property. The material is being stock piled by the Government and the interests of National Defense require that it be delivered to the Government and the aforesaid approved disposition be cancelled or rescinded.

You should immediately inform your vendees of the cancellation or rescision of any sales agreements you may have entered into.

The United States of America
By *Henry C. Laskin*
Henry C. Laskin
Contracting Officer

PLAINTIFF'S EXHIBIT NO. 18.

HAYNES STELLITE COMPANY

A Division of Union Carbide and Carbon Corp.

U C C

General Office and Works . . . Kokomo, Indiana

February 11, 1954

Surplex Sales
2409 South LaSalle Street
Chicago 16, Illinois
Attention: Mr. J. M. Andalman

Gentlemen:

We solicit offers for the following material:

Approximate Quantity	Rough Description
13,818 lbs.	80% Tungsten, 4.8% Lampblack, 15.2% Cobalt
15,248 "	94# Tungsten, 6% Lampblack
3,161 "	Barium-Stearate Acid
160 "	Stearate-Acid
10,268 "	Black Jet Lampblack
20,560 pcs.	2" x 24" Graphite Electrode Bars, Grade AGX
10,080 "	4" x 58" Graphite Electrode Bars, Grade AGX
40 "	24" x 8" x 12" Grinding Wheels
41 "	30" x 1" x 12" Grinding Wheels
173,205 lbs.	Powdered Tungsten Carbon Reduced 99% Tungsten
13,000 pcs.	Paperboard tube 6-1/2" x 1-7/8"

Bids for this material will be accepted only in writing until 5:00 P.M. standard time, Tuesday, February 23, 1954.

We invite your inspection of this material in our plant at Kokomo, Indiana as no samples will be submitted, and

no rejection will be accepted after shipment. The Haynes Stellite Company reserves the right to reject any or all bids, or to accept in part any bid, as to item or portion thereof. Terms of payment will be our option. (Cashiers check, certified check, or sight draft). All material will be shipped F.O.B. our plant, and shipping instructions will be required when material is awarded.

Please address all bids to the Haynes Stellite Company, Kokomo, Indiana, attention of Mr. R. W. Williams.

Yours very truly,
Haynes Stellite Company
C. J. Dalton /s/
Assistant Works Purchasing Agent

C. J. Dalton/ll

PLAINTIFF'S EXHIBIT NO. 20

February 24, 1954

Department of the Army
New York Ordnance District
180 Varick Street
New York, New York
ATTN: Mr. Christian Van Heest

Dear Sir:

Please find enclosed two copies of summary of bids received on termination inventory items authorized for disposal by sale. Attached also are two copies of each bid received showing dates received and time.

We are holding all materials until authorization is received from your office for release.

Haynes Stellite Company
Very truly yours,
G. H. Shelton
Office Manager

PLAINTIFF'S EXHIBIT NO. 20A.

Vendor	National Carbon		Surplex Sales		Atlantic Chemicals & Metals Co.		Alteo Products Co.		Metals & Residues, Inc.	
Date Bid Submitted	2-5-54		2-23-54		2-23-54		2-23-54		2-23-54	
Item No.	Time	Bid	Time	Bid	Time	Bid	Time	Bid	Time	Bid
1		No Bid	4:00PM	$0.04 per lb	2:29PM	$0.50* per lb		No Bid	4:32PM	$0.60* per lb
2		No Bid	4:00PM	0.05 per lb	2:29PM	0.50* per lb		No Bid	4:32PM	0.60* per lb
3		No Bid		No Bid		No Bid		No Bid		No Bid
4		No Bid		No Bid		No Bid		No Bid		No Bid
✓ 5		No Bid	4:00PM	0.022 per lb		No Bid		No Bid		No Bid
6	9:00AM	$0.02 per lb	4:00PM	25.10 per ton	3:03PM	30.50 per ton		No Bid		No Bid
7	9:00AM	0.02 per lb	4:00PM	25.10 per ton	3:03PM	30.50 per ton		No Bid		No Bid
✓ 8		No Bid	4:00PM	3.30 each		No Bid		No Bid		No Bid
9		No Bid		No Bid		No Bid		No Bid		No Bid
10		No Bid	4:00PM	Lot**		No Bid	4:25PM	$1.03 per lb	5:50PM	1.17 per lb
				1—$1.602 per lb						
				2— 1.502 per lb						
				3— 1.402 per lb						
				4— 1.302 per lb						
				5— 1.202 per lb						
				6— 1.102 per lb						
				7— 1.02 per lb						
11		No Bid		No Bid		No Bid		No Bid		No Bid

* Based on Contained Tungsten

** Lot size approximately 24,750 lbs.

Note: Time—Central Standard Time.

See attached sheet for key to item numbers.

Plaintiff's Exhibit No. 20A—Bids Submitted 205

PLAINTIFF'S EXHIBIT NO. 20B

Key to Item Nos:

Item No. 1	13,818	lbs.	80% Tungsten, 4.8% Lampblack, 15.2% Cobalt
" No. 2	15,248	"	94% Tungsten, 6% Lampblack
" No. 3	3,161	"	Barium-Stearate Acid
" No. 4	160	"	Stearate-Acid
" No. 5	10,268	"	Black Jet Lampblack
" No. 6	20,560	pcs.	2" x 24" Graphite Electrode Bars, Grade AGX
" No. 7	10,080	"	4" x 58" Graphite Electrode Bars, Grade AGX
" No. 8	40	"	24" x 8" x 12" Grinding Wheels
" No. 9	41	"	30" x 1" x 12" Grinding Wheels
" No. 10	173,205	lbs.	Powdered Tungsten Carbon Reduced 99% Tungsten
" No. 11	13,000	pcs.	Paperboard tube 6-1/2" x 1-7/8"

PLAINTIFF'S EXHIBIT 21

All Communications Should Be Addressed In Depulicate

DEPARTMENT OF THE ARMY
New York Ordnance District
180 Varick Street
New York 14, New York

EMCurran/rg/262

In Reply Refer To:
ORDEH-ID-T 160/(DA-30-069)462
Haynes Stellite Company
Division of Union Carbide & Carbon Corporation
P. O. Box 746
Kokomo, Indiana
Attention: Mr. G. H. Shelton

Gentlemen:

Contract DA-30-069-ORD-462

This is to advise that the bid of $226,570.70 by the Surplex Sales, for the termination inventory submitted by your company on Termination Inventory Schedule B, Purchase Parts and Raw Material, DD Form 543 and Schedule C, Work in Process, DD Form 544, has been accepted.

A disposal credit of $226,570.70 will be deducted from your final settlement proposal claim.

For The Deputy District Chief:

Sincerely yours,
Henry C. Laskin
Contracting Officer

PLAINTIFF'S EXHIBIT 22

HAYNES STELLITE COMPANY

A Division of Union Carbide and Carbon Corporation
General Office and Works . . . Kokomo, Indiana

March 6, 1954

Surplex Sales
2409 S. La Salle St.
Chicago 16, Ill.

Gentlemen

This is to advise you have been awarded

Approximately 173,205 lbs of powdered tungsten carbon reduced 99% Tungsten
Approximately 10,268 lbs of Lampblack
Approximately 40 Grinding Wheels

This award was granted in accordance with your bid of February 23, 1954.

Yours truly,
G. H. Shelton
G. H. Shelton

PLAINTIFF'S EXHIBIT 23

HAYNES STELLITE COMPANY

A Division of Union Carbide and Carbon Corporation
UCC
Kokomo, Indiana

TELEGRAM

Date:
Chicago Ill
March 9 1954

Mr Royal Williams

From ORDEH-ID-T15578 Laskin contracting officer this will CFM telecon of this morning in connection with contract DA-30-069-ORD-462 the following sales of termination inventory have been suspended CLN sales to metals and residues UR item No 1-13818 lbs 80 percent tungsten UR item 2-15248 lbs 94 Percent tungsten sale to Surplex sales UR item No 10-173205 lbs powdered tungsten carbon reduced 99 percent tungsten pending sale of 47200 lbs tungsten powder located at Niagara Falls these sales are suspended no deliveries are to be made whatsoever pending further instructions from New York Ordnance District you are instructed to advise all bidders involved Confirm immediately

Stangel District Chief
New York Ordnance District
180 Varick St. New York New York

March 10 1954

Noted By.....

PLAINTIFF'S EXHIBIT 24

WESTERN UNION

W. P. Marshall, President

CAE111 Long DL PD=WUX Kokomo Ind 10 103 OAMC=

SURPLEX SALES=
2409 South LaSalle St=

Rec'd 3-10-50—11:15 am.

The following wire has just been received from New York Ordnance District: "From ORDEH-ID-T15578 Laskin contracting officer this will CFM Telecon of this morning in connection with contract DA-30-069-ORD-462 the following sales of termination inventory have been suspended CLN sales to metals and residues UR Item No 1-13818 lbs 80 percent tungsten UR item 2-15248 lbs 94 percent tungsten sales to Surplex Sales UR Item No 10-173205 lbs powdered tungsten carbon reduced 99 percent tungsten pending the sale of 47200 lbs tungsten powder located at Niagara Falls these sales are suspended no deliveries are to be made whatsoever pending further instructions from New York Ordnance District you are instructed to advise all bidders involved confirm immediately=

Haynes Stellite Co—Royal Williams=

PLAINTIFF'S EXHIBIT 25

HAYNES STELLITE COMPANY
A Division of Union Carbide and Carbon Corporation
UCC
Kokomo, Indiana

cc:
Mr. R. H. Gregory
Law Dept.—New York

March 17, 1954

Department of the Army
New York Ordnance District
180 Varick Street
New York 14, New York
Attn: Mr. Stangel, District Chief

Dear Sir:

In accordance with instruction from the New York Ordnance, we had advertised for sale and solicited bids on 13,818 pounds of 80% tungsten, 15,248 pounds of 94% tungsten, and 173,205 pounds of 99% tungsten powder, carbon reduced. A tabulation of the bids and copies of the bids were forwarded to your office, attention of Mr. C. Van Heest, February 24, 1954. We were advised on March 5 by letter signed by Henry C. Laskin, Contracting Officer, that the bid by Surplex Sales for the 99% tungsten and the bid by Metals & Residues for the 80% and 94% tungsten had been accepted. On March 6, representatives from Surplex Sales were in our plant to obtain samples and were at that time advised the award had been granted them in accordance with their bid of February 23.

We acknowledged your wire of March 9, advising that the sale of tungsten had been suspended and no deliveries were to be made pending further instruction. We, in turn, advised Surplex Sales and Metals & Residues of your instruction and are holding these materials pending advice from you as to disposition.

Very truly yours,

Haynes Stellite Company
G H Shelton
Office Manager

GHShelton:vr

PLAINTIFF'S EXHIBIT 26

DEPARTMENT OF THE ARMY

New York Ordnance District
180 Varick Street
New York 14, New York

In Reply Refer To:
ORDEH-LG 160/(DA-30-069)462

3/17/54

Haynes Stellite Division
Union Carbide & Carbon Corp.
30 East 42nd Street
New York 17, New York

Gentlemen:

Reference is made to letters of this office, dated 5 March 1954, in connection with the approval of the disposition of items of termination inventory to Surplex Sales in the amount of $226,570.70 and Metals & Residues, Newark, N. J., in the amount of $17,439.60.

You are directed to turn over to the Government, in accordance with shipping instructions which will be forwarded to you in the immediate future, the following material covered by the above letters of 5 March 1954:

Item 1 —13,818 lbs. 80% Tungsten Content
Item 2 —15,248 lbs. 94% Tungsten Content
Item 10—173,205 lbs. Powdered Tungsten Carbon Reduced 99% Tungsten

You are also directed to turn over to the Government, in accordance with shipping instructions to be furnished to you in the immediate future, the following:

47,200 lbs. Powdered Tungsten Carbon Reduced, located at Niagara Falls, New York

In the event any agreements relating to the sale of the aforesaid property have been entered into you are directed

to cancel or rescind such agreements with respect to any of the property still in your possession.

Pursuant to Armed Services Procurement Regulation 8-606.2 the referenced material may not be disposed of without approval by General Service Administration. General Service Arministration has not approved this disposition of property and, accordingly, this office cannot permit you to dispose of such property. The material is being stock piled by the Government and the interests of National Defense require that it be delivered to the Government and the aforesaid approved disposition be cancelled or rescinded.

You should immediately inform your vendees of the cancellation or recision of any sales agreements you may have entered into.

The United States of America
By *Henry C. Laskin*
By Henry C. Laskin
Contracting Officer

PLAINTIFF'S EXHIBIT 29

HAYNES STELLITE COMPANY

A Division of Union Carbide and Carbon Corporation
UCC
Kokomo, Indiana

TELEGRAM

Date:
August 12, 1954
Chicago, Illinois

Mr. G. H. Shelton

From Order-ID-M19349 reference your message suspending shipping instructions NSP 33-W dated April 5, 1954 and NSP 33-W dated April 2, 1954 you are hereby directed to release tungsten powder Haynes Stellite Co Niagara

Falls, NY and Kokomo, Indiana in accordance with previously issued government bill lading and instructions now in your possession.

District Chief
New York Ordnance District
180 Varick Street
New York, New York

August 13
Noted by .....

PLAINTIFF'S EXHIBIT NO. 37.

SURPLEX SALES

March 17, 1954

Haynes Stellite Company
735 South Lindsay Street
Kokomo, Indiana

Attention: Glen Shelton

In re: Item #10 being 173,205 lbs. of Tungsten Powder on bid opening February 23, 1954, Government confirmed March 5, 1954. Also, your letter of March 5th advising us of confirmation (less 438 lbs. already delivered to us).

Gentlemen:

As you know, since on March 10, 1954 we received your telegram repeating the telegram you received from the New York Ordnance advising of suspension of delivery of the balance of this material, we have, of course, made various letter and long distance contact with the New York Ordnance and the Pentagon in Washington. We

have finally learned that a final communication, presumably, is about to reach your hands concerning the final Government attitude in the situation. We urge upon you that we be informed by mail at once what that final disposition is so that we may govern ourselves accordingly. We have a feeling that the Government is about to let the matter rest between your concern and ourselves. We have already announced our position on the question of the existence of the contract about which we both know there can be no dispute.

No doubt you must realize the terrific length to which we have gone in exploiting the market ability of the product and we do not anticipate being left high and dry in the situation.

You undoubtedly appreciate that we are completely innocent party in the situation and cannot permit a third party to cancel out the existing contract between your concern and our concern. It then follows without even saying so that if we fail to receive delivery we would be obliged to hold Haynes Stellite Company.

Avain we ask you to contact us as soon as you have any final information.

Yours very truly,
Surplex Sales
By *J. M. Andalman*
J. M. Andalman

JMA:tm

PLAINTIFF'S EXHIBIT NO. 38.

SURPLEX SALES

March 19, 1954

Haynes-Stellite Company
P. O. Box 746
Kokomo, Indiana
Attention: Mr. G. H. Shelton, Office Manager

Gentlemen:

We have received your letter of March 17, 1954 enclosing two invoices for part of the merchandise referred to in our previous communications dated March 16, 1954 and March 17, 1954 and in your "Notice of Award" dated March 6, 1954.

The merchandise received, mentioned in Invoice No. 880-1202, is referred to as a "Lot". This is an obvious error as we accepted this tungsten powder as part of the merchandise we acquired under the award. We would not wish anyone to labor under a misapprehension in that regard. Actually, our bid for the material was made to average $1.304645 per pound for the 173,205 lbs. Our check for $701.68 which you received March 6, 1954 therefore overpays for the material received by $130.46. This is consistent with the program agreed upon with your Mr. Shelton by which we were to deliver on or by March 11, 1954 the sum of $115,000.00 for which you were to release immediately 49,500 lbs. of tungsten powder retaining the balance to apply on our account. This balance together with approximately another $111,000.00, under the arrangement as to terms, was to be paid you within three weeks thereafter. This, you will notice was consistent with the terms you allowed us in the Cobalt deal last October.

The notation on the bottom of Invoice No. 880-1202-2 which notes that "handling charges will be invoiced later" is in

error. We call to your attention your original letter dated February 11, 1954 offering this material to us, and your various ads in the Waste Trade Journal, specifically February 20, 1954, Page 25, in which it is specified that the terms are "F.O.B. Kokomo Plant".

We are in a dilemma ourselves since we have made commitments which could result in lawsuits against us. Needless to say we are extremely anxious to avoid lawsuits for ourselves as well as your concern. We therefore expect that you will work out your peace with the Government to the end that we may obtain delivery of the material promptly.

Please let us hear from you at your earliest opportunity.

Yours very truly,
Surplex Sales
By *J. M. Andalman*
J. M. Andalman

JMA:tm

PLAINTIFF'S EXHIBIT 39

SURPLEX SALES

Not Inc.
Office and Warehouse
2409 S. La Salle Street
Chicago 16, Ill.

Private Siding on
Rock Island R.R.

All Phones
CAlumet 5-9130

AIRMAIL

March 10, 1954

Haynes Stellite Company
South Lindsay Street
Kokomo, Indiana
Attention: Mr. Glen Shelton, Office Manager

Gentlemen:

We are enclosing herewith copy of a letter forwarded to New York which is self-explanatory. Naturally, this letter is written in view of your phone conversation and confirming wire of today's date.

In view of this wire, we are holding our check for the first payment on the tungsten powder which we would have released today to you.

Please forward via Kain's Motor Service the 10,000 odd pounds of lamp black and the 40 grinding wheels at your convenience to Surplex Sales, 2409 S. LaSalle Street, Chicago, Illinois.

Should the powder be released, advise us immediately and we will forward our check as agreed and ship the tungsten powder to Surplex Sales c/o Edward Lasham Company at 1545 South State Street, Chicago, Illinois.

Thank you for your cooperation in this matter.

Yours very truly,
Surplex Sales
By *J. M. Andalman*
J. M. Andalman

JMA:tm
Original to
R H G
6-15-56

PLAINTIFF'S EXHIBIT 40

AIRMAIL March 10, 1954

New York Ordnance Office
C/O Termination Dept. of the Army
180 Varick Street
New York, New York

Subject: Item #10 on Termination Inventory Sale advertised for February 23, 1954 by Haynes Stellite Company, Kokomo, Indiana.

Attention: District Chief, Stangel

Gentlemen:

The above item is a residue of a termination inventory which apparently is covered by Government Contract #462 with the Haynes Stellite Company. It involved 173,205 lbs. of Tungsten Powder. We were high bidders and our bid was confirmed by the Board of Award having jurisdiction, on the 5th day of March, 1954. A small part consisting of 438 lbs., one wood barrel, was delivered to us March 6, 1954 and payment made therefor.

Pursuant to the terms agreed upon between the contractor and our office, we were prepared to make payment today. The amount involved being approximately $226,000.00, we instituted an intensive campaign Friday last for sales of this merchandise. Like any other business concern we anxiously strove for sales to recoup our proposed capital investment. We have been operating in Government surplus for almost nine years. We have never had a contract that was more complete than the one involved in the instant situation. Thousands of dollars have been spent in long distance calls and other expenses and a number of committments have been made. Some purchase orders are on hand. Many contacts have developed to the point where purchase orders for large quantities are imminent. We have virtually suspended all our other business operations since Friday last. By this we mean we employed our efforts on Saturday and Sunday as well because of the large finances involved.

You can readily appreciate our amazement when at 11:00 this morning we received a communication from the contractor advising that deliveries were suspended on order of your department. We have no knowledge of what caused this suspension but whatever it is we hope that you will proceed with dispatch to complete your inquiry and give us word at the earliest posible moment that deliveries of the balance of the merchandise is to be resumed. It is our legal position that no authority exists to stop the deliveries or to nullify our contract.

If there is any hearing to be had on this matter, we trust that we will be advised and will be given an opportunity to appear and be heard.

We also anticipate that we will be notified directly by the Ordnance Department of final disposition which, if adverse, we will wish to appeal to the proper authority or authorities in Washington, D.C. In conclusion, we cannot refrain from again emphasizing our position that we are not now in a class of "bidders" whose contract can be nullified by official Government action. We are past that stage and have accepted partial delivery and have made partial payment.

Respectfully submitted,
Surplex Sales
By *J. M. Andalman*
By J. M. Andalman

JMA:tm
cc: Mr. Glen Shelton, Office Mgr.
Haynes Stellite Company
Kokomo, Indiana
Mr. VanHeest,
Termination Dept. of Army
180 Varick Street
New York, New York

The following regulation filed by defendant Feb. 18, 1957:

GENERAL SERVICES ADMINISTRATION

Washington 25, D. C.

August 14, 1951

Emergency Procurement Regulation No. 1

TO: Heads of Federal Agencies

SUBJECT: Transfer of Excess Strategic and Critical Materials to the Stock Pile

1. Purpose. This Regulation prescribes the policy and general methods for the transfer of excess strategic and critical materials to the stock pile. It is issued pursuant to the provisions of the Strategic and Critical Materials Stock Piling Act (60 Stat. 596; 50 U.S.C. 98-98h), and the Federal Property and Administrative Services Act of 1949, as amended (Public Laws 152 and 754, 81st Congress), and in cooperation with the Munitions Board of the Department of Defense.

2. Definitions.

   a. "Agency" means any agency of the United States, including any executive department or independent establishment in the executive branch of the Government (including any wholly owned Government corporation) or any establishment in the legislative or judicial branch of the Government.

   b. "Contractor inventory" means (1) any property acquired by and in the possession of a contractor or subcontractor (including Government-furnished property) under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (2) any property which the Government is obligated

or has the option to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government.

c. "Excess", with respect to strategic materials, means any such property under the control of any agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

d. "Holding agency" means any agency having accountability for strategic materials.

e. "Strategic materials" means material determined to be strategic and critical by the Munitions Board pursuant to the Strategic and Critical Materials Stock Piling Act, a list of such materials being appended hereto as Appendix A.

3. Reports of Excess to the General Services Administration.

a. General Requirement of Reporting. All strategic-Appendix A, when determined to be excess, shall Appendir A, when determined to be excess, shall be reported by the holding agency to the Administration for the purpose of determining disposition either by transfer to the General Services Administration for stock piling or by other transfer or disposal. Unless otherwise directed by the Administration in specific cases, holding agencies shall not be required to determine prior to such report whether such strategic materials meet Munitions Board specifications.

b. Reporting Less than Specified Quantities. Subject to paragraphs (1) and (2) of this subsection

b., each holding agency having excess strategic materials at any one location in lots less than the minimum quantities specified in Appendix A shall retain such materials until the specified minimum is accumulated and thereafter shall report such materials to the Administration as provided in this Regulation.

(1) Whenever a holding agency has excess strategic materials at any one location in lots of 50 per cent or more of the minimum quantities specified in Appendix A, and such holding agency determines that there is no reasonable prospect of accumulating, within 12 months, the minimum quantities specified, it shall report such materials to the Administration for determination of suitability for the stock pile.

(2) Whenever a holding agency having excess strategic materials at any one location in lots of less than 50 per cent of the minimum quantities specified in Appendix A determines that there is no reasonable prospect of accumulating, within 12 months, strategic materials in the amount of 50 per cent of the minimum quantities specified in Appendix A, it shall report and dispose of such excess in accordance with the provisions of General Services Administration Personal Property Management Regulation No. 3, Revised.

c. Form of Reports. Holding agencies shall file reports of excess strategic materials with the Administration on Standard Form 125, Report of Strategic and Critical Materials, and Standard Form 125a, Continuation Sheet, in accordance with

the instructions set forth in Appendix B of this Regulation.

d. Contractor Inventory. Each agency having strategic materials in contractor inventory which are determined to be excess to the needs of the agency, shall report such materials in the manner prescribed by this Regulation. In the case of contractor-owned contractor inventory, compliance with the reporting requirements of this Regulation should ordinarily occur prior to exercising the applicable option to take over such property. When after reporting such property, the strategic materials are determined suitable for stock piling, the contracting agency shall take the necessary action to acquire title for the Government and shall transfer such property to the General Services Administration for stock piling, in accordance with Section 4 of this Regulation.

4. Transfers to the Stock Pile.

a. General. Excess strategic materials reported to the Administration, which are determined by the Administration to be suitable for stock piling, shall be transferred to the General Services Administration for stock piling in accordance with this Regulation.

b. Unsuitable Items. Excess strategic materials reported to the Administration which are determined by the Administration to be unsuitable for stock piling or which cannot economically be converted to meet stock pile requirements shall, after notification of such determination, be reported and disposed of in accordance with the provisions of General Services Administration Personal Property Management Regulation No. 3, Revised.

c. Withdrawals. Subject to the approval of the Administration, holding agencies may withdraw, for their own use, excess strategic materials reported by them to the Administration, provided that, prior to the withdrawal request, such excess strategic materials have not been incorporated in the stock pile, as determined by the Administration.

d. Reimbursement. Transfers of excess strategic materials to the General Services Administration for stock piling shall be made without reimbursement or transfer of funds, except as provided herein. All expenses of preparation for shipment, all shipping and conversion expenses and all expenses after the date of shipment (including transportation, maintenance and storage) which are incident to the transfer of excess strategic materials to the General Services Administration for stock piling may be paid from funds appropriated pursuant to the Strategic and Critical Materials Stock Piling Act unless the holding agency elects to bear such expenses.

5. Regulations and Orders of Other Agencies. In taking action pursuant to this Regulation, consideration must be given to applicable regulations and orders of other Government agencies, such as the National Production Authority.

6. Exceptions and Deviations. Exceptions from any portion of this Regulation and deviations from any mandatory forms prescribed hereby shall be permitted only by direction of the Administrator.

7. Rescission of Regulations. War Assets Administration Regulation No. 17, dated April 26, 1949, and all orders issued thereunder, are hereby rescinded and reference to such Regulation No. 17 in other regula-

tions or instructions, where applicable, shall be deemed to be references to this Regulation.

8. Effective Date. This Regulation shall become effective September 14, 1951.

Russell Forbes
Russell Forbes
Acting Administrator

Attachments

1 Abstract of Deposition for discovery of

MAXWELL N. ANDALMAN

Taken for defendant before William I. Staton, a Notary Public within and for the County of Cook and State of Illinois, at Room 450, U. S. District Court House, Chicago, Illinois, on Friday, November 2, 1956, at 2:00 P.M.

2 Appearances:

Messrs. Elmer Gertz and Irwin S. Baskes, by
Mr. Elmer Gertz,
for the plaintiffs;
Honorable Robert Tieken
United States Attorney
Mr. Richard C. Bleloch
assistant United States Attorney,
for the defendants.

4 MAXWELL N. ANDALMAN, being sworn, testifies:

My name is Maxwell N. Andalman, 7020 South Jeffery Boulevard, Chicago, Illinois. I am a practicing attorney and I am in the public warehousing business and the buying and selling, mostly at wholesale, of general merchandise. I was admitted to practice in
5 1914. I have practiced law continuously since that time

in the City of Chicago, with slight intervals. I am a partner in Edward Lasham Company, 1545 South State
6 Street, Chicago Illinois. That is the address of one of our warehouses. I am also a partner in Suplex Sales, in the wholesale jobbing business. That's the only public warehouse. And that's at 1545 South State Street, Chicago. We bought Lasham in 1950, I think the 1st of September, 1950.

The other members of that partnership are, Rose Finsky, Joseph Andalman, Lee B. Andalman, Avrum Andalman, Yetta S. Andalman and myself. That's six. Of course, the respective wives of my children also have title in this partnership.

7 The Edward Lasham Company operates a licensed, bonded custom warehouse. It is bonded by the State and it is authorized by the United States Customs.

This business of buying and selling merchandise, is known as Surplex Sales. The partners in Surplex Sales are the same as the partners in Edward Lasham Company. Are the same persons who are all the plaintiffs in this lawsuit. Surplex Sales was formed originally in April or May of 1945. We buy and sell merchandise of every kind, generally dealing in it at wholesale.

8 They maintain a warehouse and yard at 2401 to about I would say 2425 South La Salle Street. The office is at 2409, in Chicago. All the partners in Surplex Sales are general partners. Active partners are Joseph M. Andalman and Lee B. Aandalman; I participate and my son, Arvum N. Andalman, also participates. Neither Miss Finsky nor my wife actively participate except through representation of somebody in there.

9 The size of the building approximately is 110 feet by 100. There are three floors and a basement. It has a

total area of approximately 44,000 square feet, and the size of the yard is approximately 175 by 125, not counting the side track, the railroad side track.

Since Surplex Sales was organized in 1945, it has bought property at Government sales. I would say in the vicinity of 250 times, Government sales and contract termination sales. Prior to February 23rd, 1954, I would say around 200—215.

10 Our file number on this tungsten proposition I think is 222, and most of those are overnment sales, Government purchases or contract termination inventories. I don't know the percentage of each. At each time where we made a purchase at either a Government sale or a Government contractor termination sale, we opened up a file on that in our office and gave a number.

In addition to those sales where we were the successful bidder, we have also submitted other bids during this period to either the Government or a Government contractor for other property in which we were not the successful bidder.

11 Most of the time we discard the documents; otherwise, we would have a library. We have gotten them by the dozens and hundreds, bid offerings from both the contractors and the Government.

We have been getting the Waste Journal and The American Metal Reports. We have gotten The Wall Street Journal of Commerce. We are subscribers to a

12 periodical known as Sales. All three of us, myself, my son Joseph and my son Lee B. do the bidding.

Sometimes we act collectively on it; sometimes we act individually on it. Sometimes we go out and inspect the material individually; sometimes we go collectively. We have dealt in practically all types of merchandise and material, but mostly durables. We have not operated in soft goods to any great extent. We have

had several fairly good sized buys of soft goods but not very often.

On or about February 23rd, 1954, we submitted a bid for the purchase of the property involved in this case. The three of us collaborated on that. And that
13 bid also included a bid on some lamp black and some grinding wheels. There was a bid submitted by us for tungsten powder and several other alloys of tungsten powder and lamp black and grinding wheels, and I think we bid on about ten out of twelve items that were offered by Haynes, Stellite, but we did not submit any bid at that time for cobalt powder that I recollect unless it was involved—I have no immediate recollection of any cobalt being involved in that bid. I could tell from the ad. We purchased some lamp black and some grinding wheels from Haynes, Stellite Company which had been involved in a Government contract cancellation in '54.

14 That's what we were given to understand. We submitted the bid for that lamp black and those grinding wheels, in the same instrument, same document with the tungsten. Subsequently to the bid we submitted, we paid Haynes, Stellite for the lamp black and the grinding wheels. And after we paid for those things they were delivered to us.

On Saturday, March 6, 1954, we went to Kokomo, Indiana, to the office of the Haynes, Stellite Company.
15 My middle son, Joseph, and I drove down there from Chicago together. When we got to Kokomo, we went to the office of Haynes, Stellite Company. We went to the guardhouse to gain entry and learned that Mr. Shelton had not appeared yet. I am referring to Mr. Glen H. Shelton who is the office manager at the Haynes, Stellite plant at Kokomo. And subsequently, my son and I were admitted to the office of the plant.

When Mr. Shelton came there, he passed us through the guards and we all went in together. And we had a conference there with Mr. Shelton. At the beginning
16 of the conference, I think there was just myself, Mr. Shelton, and my son Joseph. We were joined shortly after, maybe a matter of minutes, by a Mr. Royal W. Williams. I don't recollect anybody but the four of us. Mr. Dalton was not there that day. So all the conversations we had on March 6th, 1954, at the office of the Haynes, Stellite Company, with anyone connected with Haynes, Stellite Company, other than the guard out at the gate, were with Mr. Shelton and with Mr. Williams. With either one of them or both, because they weren't together all the time. I have no recollection of anybody else participating in these conversations except Mr. Williams and Mr. Shelton.

17 We met by pre-arrangement for the purpose of receiving at the hands of the Haynes, Stellite people, the defendant, a subdivision or division, receiving some of the tungsten powder, leaving a deposit to cover—more than enough to cover its payment, and to discuss the question of delivery and payment. I didn't at that time give them any actual tender of any $226,000. That was not expected because we didn't even have official notification of an award. I didn't even have official notification of an award. I didn't have $226,000 with me at that time. In March, 1954,
18 Surplex Sales, the partnership, maintained a bank account at the Southmoor Bank and Trust Company, 6760 South Stony Island Avenue, Chicago, Illinois. I have no present recollection of any other account of Surplex Sales at that time. I don't believe we had any other. At the time we went to Kokomo on March 6th,

1954, we did not have with us any letter of credit from any bank. And didn't exhibit any letter of credit to Mr. Shelton or Mr. Williams. On March 10th, 1954, we were ready with a payment of 110 to $115,000 when a telegram came from the defendant saying that the Government had suspended delivery and after, we had a telephone conversation with Mr. Shelton in which he said he wouldn't turn over the stuff until the Government angle had been cleared up. That 110 or
19 $115,000 was not the full purchase price, that was only according to the arrangements made with Mr. Shelton. The total amount was $226,000 and we were ready with $100 to $115,000 on March 10th. We had commitments for the balance of the purchase price on March 10. There was approximately, I think 75 or $80,000 in our bank account and commitments to us had been
20 made for the various subscribers, for the balance between 75 or $80,000 and 110 or $115,000. We had not even borrowed money from our own bank. We had made arrangements for borrowing for the difference between what we had on hand and the 110 or $115,000. Those commitments were made to us by the Southmoor Bank and Trust Company. In other words, they were going to loan us the difference between 75 or $80,000 and 110 or $115,000, and they made arrangements for us to get the additional $150,000 to make up the whole $226,000.

They gave me a letter showing they had the funds available when it was necessary. I don't remember the date. They gave me a letter showing they had $150,000. • • •

Mr. Bleloch: Q. Do you have that letter in your files?

21 A. I must have.

Q. Where is that letter located at the present time?

Mr. Gertz: I have it in my files.

The date of that letter,—my recollection would be in May, 1954 when a meeting was arranged between Government officials—

You see, I took sick immediately, in the middle of March, '54, and I had pneumonia and I had auromycin poisoning, and before I got out and was able to navigate, it was around the 1st of May or so and I reached a stage of convalescence where I could comply with—attempts had been made since the middle of March, up until the beginning of May, for such a conference between the Government officials and Haynes Stellite Company and ourselves, and there was such a meeting.

I think Mr. Hintz signed the commitment letter.

22 Q. Now, as I understand, you have turned that letter over to your attorney, Elmer Gertz?

A. Yes, I think so.

Mr. Gertz: Yes, I have it, I recall.

Mr. Andalman: That is the only letter of credit or commitment which we had from the bank to raise money to pay this purchase price.

I had understandings with people from whom I borrowed various sums of money for taking over this merchandise.

Some of those understandings were in writing.

There was a man by the name of Al Fox, Secretary or President of Aetna Paper Company on the northeast corner of 24th and La Salle Street, in Chicago.

23 If I am not mistaken, he actually turned over $15,000 to us; a man by the name of Max J. Finsky, a brother to Rose Finsky.

I think he had turned over $7500 to us; a sister of Miss Finsky, Mae Finsky, with $3,000, I believe it was; Miss Finsky's mother, although I don't think there was

anything in writing with us, she was letting us have $3,000; a Dr. Leo Pevsner, I think it was either three or $5,000.

I got a list of them somewhere, and with the money they had on hand.

I don't know if I have got that list here or not. No, I don't have that list here.

Q. Have you turned that list over to Mr. Gertz?

A. No, no reason for him to have it because the question of the payment of the money was not an issue in this case, never has been.

Mr. Bleloch: I move that be stricken as not responsive.

Q. I ask you again: Did you turn that list over to Mr. Gertz?

24 A. I have no recollection of turning it over to him. I probably have it among my own papers. • • •

Surplex Sales only received delivery of one barrel of tungsten.

One barrel, I think 438 pounds. It was a wooden barrel as I recall it.

That was delivered to me and my son when we were down at Kokomo on March 6th, 1954.

We give them a check that amounted to an overpayment on the average price and they tried to refund the money afterwards, $130 or something like that, they sent us a check, and we returned it to them. That was by Haynes, Stellite.

I gave them a check for something over $700 and they figured it out; they only had about $570 coming, and something like a month or so after they failed to deliver the merchandise, they sent us a check.

25 We didn't receive the 173,000 pounds. We received only—

Q. (Interposing.) You didn't pay for the 173,000 pounds, did you, Mr. Andalman?

A. No, they didn't give us a chance.

Q. Well, you didn't pay for it, did you, Mr. Andalman?

A. Simply because they never gave us a chance, that's all.

Q. Will you answer my question?

Mr. Gertz: There is no point in arguing. The record shows they always tendered—they were always ready, willing and able—

Mr. Bleloch: I want a direct answer to the question.

Mr. Gertz: Then you shouldn't argue with the witness either.

Mr. Bleloch: I am not.

The Witness: I will give you a direct answer.

We never physically gave them $226,000.

Q. That's right.

A. Because we were never expected to give it to
26 them until they gave us the merchandise.

Mr. Bleloch: I move that comment of the witness be stricken beyond the answer to the question.

The Witness: Doesn't the understanding between people have something to do with this?

Mr. Bleloch: That's a matter of argument in the court.

The Witness: You have to have the facts, too.

Mr. Bleloch: I didn't ask you anything about a conversation.

The Witness: I know you didn't.

Mr. Bleloch: I believe that's all, Mr. Andalman.

The Witness: Okay.

Mr. Gertz: I would like to make one statement for the record. The plaintiffs were at all times and are now ready, willing and able to pay in full for the 173,000 pounds—

Mr. Bleloch: I move that be stricken here. That's purely argumentative.

Mr. Gerz: It has to be in the record that an offer has been made and an offer has been continuously made from March 6th, 1954, to this date, and I want the record to so show.

Mr. Bleloch: I move to strike that from the record, and I will as soon as the deposition is filed.

Further Deponent saith not.

November, A. D. 1956.

Certification.

1 Abstract of deposition of Ralph Kenneth Schlitz, Sr., taken by defendant before Eloise Dwyer, a notary on November 20, 1956.

2 Present: Irwin S. Baskes and Elmer Gertz, by Elmer Gertz for plaintiffs; Robert Tieken, by Richard C. Bleloch, on behalf of Defendants.

Mr. Bleloch: We take the deposition of Mr. Schlitz as an officer or agent or employee of Southmoor Bank & Trust Company and we are willing to stipulate to waive the signature of the witness.

3 Mr. Gertz: Upon reasonable opportunity to examine the deposition and correct errors, we will waive signatures.

RALPH KENNETH SCHLITZ, SR., being sworn, testified as follows:

Examination by Mr. Bleloch.

The Witness: My name is Ralph Kenneth Schlitz,
4 Sr. I live at 14930 Ebens Avenue, Dolton, Illinois. I am an officer of the Southmoor Bank & Trust Company, assistant cashier. I have been there employed a little over 8 years. I am here in response to subpoena served on Mr. Corrington, the president. I have brought with me records of the Southmoor Bank & Trust Company with reference to the account of Surplex Sales. I have a ledger sheet here taken from the record books
5 of the bank covering the dates of March 3, 1954 back to February 5, 1954. One side covers March 3, 1954 to March 30, 1954, and the other are dated. I also have a letter taken from the credit file of Surplex Sales credit folder dated March 26, 1954 and addressed to Maxwell N. Andalman care of Surplex Sales and signed by Edward N. Hintz, Executive Vice-President (at that time).

The ledger sheet was then marked as Defendants' Exhibit No. 1 for identification.

6 The Witness: This, Defendants' Exhibit No. 1, is the original commercial ledger record from the Southmoor Bank & Trust Company for the account of Surplex Sales. The face thereof covers the period from March 3, 1954 through March 30, 1954 and shows on
7 the right hand side the balance.

Document admitted as Exhibit No. 1 without objection.

Whereupon Mr. Bleloch stated he was substituting a photostat for the original and returning the original to the witness in accordance with agreement of counsel.

8 The Witness: This exhibit No. 2 is a copy of a

letter sent to Mr. Maxwell N. Andalman of Surplex Sales and was taken from the credit file of Surplex Sales in the Southmoor Bank & Trust Company and is dated March 26, 1954 addressed to him at 2409 South LaSalle Street.

9 By agreement, Exhibit marked No. 2 and offered in evidence with no objection on the part of opposing counsel.

10 The Witness: I did not in my examination of the files of the Southmoor Bank & Trust Company find any other copies of any letters of credit other than Exhibit 2. I am willing to waive my signature on the deposition. • • •

13 Certificate of Eloise Dwyer to correctness of transcript of Mr. Schlitz' testimony.

14 Dated November 30, 1956.

Attached thereto is a photostatic copy of the said Exhibit 1; the Southmoor Bank & Trust Company ledger sheet of the account of Surplex Sales showing that on March 10, 1954 Surplex Sales had on hand $77,881.66; and on March 11, 1954 it had on hand $78,468.58.

Attached thereto also is a photostatic copy of the Exhibit 2 on the letterhead of the Southmoor Bank & Trust Company bearing date March 26, 1956, addressed to Maxwell N. Andalman, c/o Surplex Sales, 2409 South LaSalle Street, Chicago, Illinois, stating that the loan committee approved an additional line of credit to the Surplex Sales in the sum of $35,000.00 and that they had made arrangements with corresponding banks to grant Surplex Sales additional loans to a total of $150,000 to be secured by warehouse receipts for tungsten powder and requesting to know how soon the funds would be needed. This was signed by Edward A. Hintz, Executive Vice-President.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE HON. MICHAEL L. IGOE ON JANUARY 25, 1957, DURING ARGUMENTS ON SUMMARY JUDGMENT MOTIONS.

• • •

51 The Court (to attorney for defendant): I take it also that if this transaction had been completed you wouldn't have had any standing here, that is, if they had actually gone in and taken possession of this property and paid for it?

Mr. Strugala: Well, your Honor, under that provisions that we have argued, the provision that says where title transfer is not taken, mistakenly or otherwise, the purchaser may keep the property.

The Court: Yes?

Mr. Strugala: If they had walked in that day with $226,000, your Honor, they could have gotten that material.

The Court: Then you wouldn't have had any standing?

52 Mr. Strugala: That is right.

The Court: But because it had not been completed in a fashion which indicated finality, why, you insist that you have the right to go in and do what you have done on behalf of the Government?

Mr. Strugala: Yes, your Honor. • • •

• • •

54 The Court (to attorney for plaintiffs): What decides whether or not they had power to deal with you?

Mr. Baskes: Their statements to us that they had merchandise to sell. Their statement to us that they were taking bids. This, your Honor, is the way I view it, and it is no different than an ordinary real estate deal where "A" agrees to sell and "B" agrees to buy,

and a Letter of Opinion, let us say, is ordered from the Title Company and there is some cloud on the title.

"B" says, "I agree to buy this property." Can "A" just say, "Sorry, I can't sell you this property. It develops there is some lien, some cloud against it."

The Court: No, but suppose the person who has the cloud comes in and says, "You don't have a good title."

Mr. Baskes: If the person having the cloud comes in?

The Court: Yes.

Mr. Baskes: Well, the person having the cloud can
55 come in and do what he wants to do. Actually, your Honor, the person having the cloud in this case, if there were a cloud, would be the Government. But the Court must remember that the Government is not in this case, only the defendant as a private corporation.

We are not suing the Government. The Government is not suing us. If there is any dispute between this defendant and the Government, let them litigate among themselves. We are not a party to that.

The Court: You say the Government is not in here?

Mr. Baskes: No, sir, the Government is not in here. This is a suit between private parties against the Union Carbide & Carbon Corporation, a private corporation. The Government is not a party to this litigation. The mere fact that they are represented by the United States Attorney does not make the Government a party to this suit.

• • •

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 871

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, LEE B. ANDALMAN, YETTA S. ANDALMAN and MAXWELL N. ANDALMAN, Co-Partners doing business under the name of SURPLEX SALES,

Petitioners,

vs.

UNION CARBIDE & CARBON CORPORATION, a New York Corporation, Owners and Operators of Division Thereof Known as HAYNES STELLITE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1958

No.

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, LEE B. ANDALMAN, YETTA S. ANDALMAN and MAXWELL N. ANDALMAN, Co-Partners doing business under the name of SURPLEX SALES,

Petitioners,

vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners (Plaintiffs below), Rose Finsky, Avrum N. Andalman, Joseph M. Andalman, Lee B. Andalman, Yetta S. Andalman and Maxwell N. Andalman, co-partners doing business as Surplex Sales, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS OF THE COURTS BELOW

The Memorandum Opinion of the District Court was not published. It is set out (Rec. pp. 133-134) in the record here and is also set out in full in Appendix ff.

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported in 249 F. (2nd) 449 and is set forth in Appendix ff.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was rendered on November 21, 1957 (Rec. 241) and petition for rehearing was filed in accordance with the Rules of the United States Court of Appeals for the Seventh Circuit. The Petition for Rehearing was denied on December 26, 1957 (Rec. 241).

The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254(1).

QUESTIONS PRESENTED

The following important questions are presented by this Petition:

I.

Are Petitioners, in particular, and the Public, in general, bound by a federal agency regulation, which was not published in the Federal Register, as required by Title 44 of United States Code, Sec. 301-310?

In 1954 the Ninth Circuit has held that such an unpublished regulation is not binding and is ineffective. (*Hotch* v. *U. S.*, 212 Fed. (2nd) 280.)

In 1957, the Seventh Circuit, in the case at bar, has held to the contrary (*Finsky et al.* v. *Union Carbide & Carbon Corp.*, 249 Fed. (2nd) 449), and this is in direct conflict with the decision of the Ninth Circuit in the *Hotch* case.

II.

Does any instrument, issued by an executive agency of the United States which purports "to transfer title or any other interest" in Government "surplus property" to a "bona fide" "transferee for value, and without notice of lack of compliance", constitute "conclusive evidence of compliance with the provisions of" Section 484(d) of Title 40 United States Code?

In 1949, the Ninth Circuit has held that such transferee's rights were invulnerable to attack. (*United States* v. *Jones*, 176 Fed. (2nd) 278.)

In 1957, the Seventh Circuit, in the case at bar, has held that such transferee's rights are vulnerable to attack (*Finsky et al.* v. *Union Carbide & Carbon Corp.*, 249 Fed. (2nd) 449), and this is in direct conflict with the Ninth Circuit decision in the *Jones* case.

III.

Is Strategic or Critical material in Government Surplus Termination Inventory (of which the United States has not taken possession) exempt from Stockpiling under Title 50 United States Code Section 98e (a)?

This is an important question of law never before decided by this Court. The Federal Statute, above cited, plainly states that it is exempt.

The Seventh Circuit, in the instant case, (*Finsky et al. v. Union Carbide & Carbon Corporation*, 249 Fed. (2nd) 449) has refused to give effect to this statutory provision.

This question ought to be settled by a decision of the Supreme Court of the United States for future guidance in business dealings with the United States Government.

STATUTES, REGULATION, AND CONSTITUTIONAL PROVISIONS INVOLVED:

(a) Title 44 United States Code, Sec. 301-310.

(b) Title 5 United States Code, Sec. 1001-1011.

(c) Title 40 United States Code, Sec. 484(d).

(d) Title 50 United States Code 98e(a).

(e) General Service Administration Emergency Procurement Regulation #1. (Unpublished)

(f) United States Constitution, Amendment V.

The above are reproduced in full in the Appendix ff.

STATEMENT OF THE CASE

Jurisdiction of the United States District Court for the Northern District of Illinois was based on diversity of citizenship and amount involved (Rec. 10).

This is an action to recover from respondent for its failure to deliver merchandise (Rec. 207) to petitioners pursuant to agreement (Rec. 18, 166, 170, 179, 203, 205, 206, 207).

Union Carbide & Carbon Corporation, respondent, in February of 1954 (Rec. 17, 157), advertised Government Contractor Termination Inventory for sale, requesting therein that bids be submitted by 5:00 P.M. February 23, 1954. The advertisements stated "Bids were subject to approval by the United States Government" (Rec. 17).

Such bids amounted to over $226,570.70 for certain of the advertised materials, including 173,000 pounds of tungsten powder (Rec. 18, 207). Petitioners, Surplex Sales, was advised that their bid was high and if the Government approved the bid, the merchandise would go to them (Rec. 11).

On March 5, 1954, petitioners were informed by the United States Ordnance Corps that their bid was high. (Rec. 12, 67, 161, 168, 175 ff). That same day, the Government approved Surplex Sales' bid, in writing, and authorized the respondent to sell to petitioners (Rec. 30, 51, 97, 101) and charged the amount of the petitioners' bid to respondent's account (Rec. 30, 51, 97, 101). The respondent admits this governmental instrument "purports to relate to the transfer" of the "interest of the Government" in this tungsten. (Rec. 51).

On March 6, 1954, petitioners' representatives met with respondent's representatives, at its plant. After petitioners there stated when and how they would pay the total

amount of their bid, and after one barrel was delivered to petitioners (Rec. 170) and payment on account was made, respondent then handed to petitioners the award in writing (Rec. 12, 35, 58, 59, 167 ff, 175 ff, 179).

Prior to delivery of the said barrel, a discussion was had about the making of payment. Respondent admits that in this discussion petitioners proposed that by March 11, 1954, they would pay one-half of the money to respondent and would accept one-third of the merchandise, and that by March 31, 1954, they would pay the other half and accept the balance of the merchandise (Rec. 162, 179). *It was immediately after this conversation that respondent delivered, then and there, to petitioners the letter showing that the property was awarded to them* (Rec. 35, 207).

Respondent admits that the government Contracting Officer, acting for the Department of the Army, did not reserve or request title to or possession of the tungsten for or by the Government at any time prior to the Government's approval, on March 5, 1954, of petitioners' bid (Rec. 52, 102, 157).

March 10, 1954, the respondent sent petitioners a letter quoting a telegram it had just received from the Contracting Officer directing it to "suspend delivery" to the petitioners and other bidders (Rec. 37, 209). The Contracting Officer who sent this telegram was the same one who had approved petitioners' bid, in writing, which writing had been delivered to the respondent on March 5, 1954, wherein he informed respondent that the amount of petitioners' bid was thereupon being charged against the respondent (Rec. 5, 30, 51, 97, 101).

Subsequent attempts by the petitioners to procure a hearing in the Ordnance Corps and in the General Services Administration were rebuffed with the written statement, in each department, that there was no privity of contract

between the petitioners and either the Department of the Army or the General Services Administration. (Rec. 60).

In the interim petitioners had learned that it was contended the Contracting Officers had violated some Regulation in not obtaining clearance from General Service Administration.

Then on April 14, 1954, respondent admitted that petitioners had had no prior knowledge that any Government Regulation had been violated and its representative said that after the suspension order had been received by him, it was he who had relayed that information (Rec. 70 ff) to petitioners.

Later it developed that the Regulation was unpublished and was issued as General Services Administration Emergency Procurement Regulation #1 and was directed, *not to the Public, but only* to "HEADS OF FEDERAL AGENCIES" (App. ff 33-37).

Respondent filed its Motion For a Summary Judgment (Rec. 26-27, 28 ff). Petitioners also moved for a Summary Judgment on *question of liability* (Rec. 54, 55 ff, 65 ff, 123 ff, 154 ff, 171 ff, 173 ff). On March 4, 1957 Summary Judgment was entered in favor of the respondent (Rec. 152) and Motion by Petitioners for a Summary Judgment on question of liability was denied.

Appeal was perfected to the Seventh Circuit. On November 21, 1957 the Court of Appeals Opinion and Judgment was filed affirming the Judgment of the District Court (Rec. 241). Petition for Rehearing was filed and an order entered on the 26th day of December, 1957, in which a rehearing was denied (Rec. 242).

REASONS FOR GRANTING THE WRIT

Very important questions of Federal law are involved herein:

I.

(a) Because the decision of the Court of Appeals for the Seventh Circuit disregards the Acts of Congress creating the Federal Register, (Title 44 Sec. 301-310) and nullifies Sec. 307 thereof, which provides that "no document required under Sec. 305 of this Title, to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the documents shall have been filed with the Division and a copy made available for public inspection as provided in Sec. 302 of this title."

(b) Because the United States Court of Appeals for the Seventh Circuit, in the instant case, has held that an unpublished Federal Agency regulation was binding upon the public in general and the petitioners in particular and this contravenes the Acts of Congress, Title 44 of the United States Code, Sec. 301-310, and is in direct conflict with the decision of the Ninth Circuit in *Hotch* v. *United States*, 212 Fed. (2nd) 280.

II.

(a) Because the decision of the Court of Appeals for the Seventh Circuit in the case at bar, violates the plain intent and meaning of subsection (d) of Section 484 of Title 40 United States Code. The said decision fails to recognize that this subsection, (which provides that any instrument executed by an executive agency "purporting to transfer title or any other interests in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title

or other interests of any bona fide grantee or transferee for value and without notice of lack of such compliance") constitutes an exception as provided in sub-section (a) and creates a rule of substantive law.

(b) Because the decision of the Seventh Circuit in the case at bar is in direct conflict with the decision of the Ninth Circuit in *United States* v. *Jones*, 176 F. (2) 278.

III.

(a) Because Strategic or Critical Material in Government Surplus Contractor Termination Inventory which has not been taken possession of by the Government is exempt from stockpiling under Title 50 United States Code, Sec. 98e, Subsection (a).

(b) Because the decision of the Court of Appeals in the instant case is in direct conflict with the simple, plain and explicit language of said subsection (a), Sec. 98e.

(c) Because the decision of the Court of Appeals for the Seventh Circuit deals with an important question of law, never before decided by this court. This ought to be settled by the United States Supreme Court for the future guidance of all Governmental agencies, and for the public doing business with Governmental Agencies involving Government Surplus property and contractor termination inventory.

ARGUMENT.

The Federal Register Act is set out in Title 44 of the United States Code at page 6453, Sec. 301-310. As stated by the United States Court of Appeals for the Ninth Circuit in *Hotch* v. *United States,* 212 Fed. (2nd) 280, at 283 this act is "more than a mere recording Statute whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. The acts set up the procedure which must be followed in order for agency ruling to be given the force of law. *Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective.*" (Emphasis ours). At page 284 of that opinion it is said, "We hold that since neither the proposed regulations nor the regulation itself in the instant case were ever published, the regulation is not valid, whether or not appellant had actual notice of its contents."

It is also there stated, page 281, that "Sec. 5-(a) of the Federal Register Act, Title 44 United States Code, para. 305, requires the publication in the Federal Register of • • • such • • • classes of documents as may be required to be published by acts of Congress. Any such document which is not duly published is invalid. In 1946 Congress enacted the Administrative Procedure Act, 60 Stat. 237, 5 United States Code Annot. Sec. 1001 *et seq.*" describing certain classes of documents which it required to be published. "Sec. 4 (a) of the Administrative Procedure Act, Title 5 U.S.C.A. par. 1003 (a) requires that 'general notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) • • •' ".

And, Sec. 3(a) (3) Title 5 U.S.C.A. par. 1002 (a) (3) requires that:

> "Every agency shall separately state and currently publish in the Federal Register * * * substantive rules adopted as authorized by law * * *".

This *Hotch* decision then proceeds to quote and point out the report of the House of Representatives Committee on the judiciary in support of its decision. This decision gives complete and full recognition to the fact that congressional directive must be followed in the issuance of agency regulations and must be strictly complied with because such regulations are an exercise of delegated legislative power. In the instant case the *Court of Appeals* for the Seventh Circuit *concedes* that General Services Administration Emergency *Regulation No.* 1 *was not published.*

It is conceded that the Government Contracting Officer in the instant case directed the contractor (respondent herein) to proceed to receive bids for the property in question, and to sell same. This was done.

We have here a clear cut case where the United States did not take possession of surplus contractor termination inventory.

Under these circumstances, there is applicable Sub-Sec. (a) of Section 98e of Title 50 of the United States Code, wherein it is plainly stated "there shall be exempt from this requirement [stockpiling] (1) any material which constitutes contractor inventory *if the owning agency shall not have taken possession of such inventory*)". (Emphasis ours) (Title 50 p. 7338 United States Code Sec. 98e (a)).

The decision of the Court of Appeals in the instant case is in direct conflict with the Statute which is designed to

cover all cases of the kind and character here and now under consideration. This conflict poses an important question of law never before decided by this court, and we respectfully submit that this court ought to clarify the law.

There must also be considered that the exception appearing as sub-section (d) of Section 484 of Chap. 10, Title 40, of the United States Code protects the Petitioners in that, among other things, there had been issued an "instrument executed by or on behalf" of an "executive agency purporting to transfer title or *any other interest* in surplus property" to Petitioners "under this subchapter". (Emphasis ours.)

The further provision of such exception that such instrument "shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any *bona fide* * * * transferee for value and without notice of lack of compliance" constitutes full and complete protection to petitioners. *It is conceded that Petitioners are bona fide transferees.*

The case of *United States* v. *Jones*, 176 Fed. (2) 278 at 288, 289 and 290 determined that the exception above discussed was full and complete protection to *bona fide* purchasers, and that instruments executed by executive agencies transferring Government interests are conclusive, and that the conclusiveness established by the Act of Congress *declares a rule of substantive law.* At page 290 of this decision the United States Court of Appeals for the Ninth Circuit said:

> "We are, therefore, of opinion that the Government cannot impeach the unrecallable conclusiveness of the sales memoranda and bills of sales given to Jones by persons acting for the Maritime Commission and the War Assets Administration * * *".

The approval of the bid of Petitioners, coupled with the charging of the account of Respondent by the executive agency, is the final "other instrument" which was issued by the Contracting Officer to divest the United States Government of all right to the property and simultaneously invested the Petitioners with the right to complete its transaction with the Respondent.

By Governmental action Petitioners were deprived of their property rights, and their property was thereby confiscated by the United States Government in violation of their rights under the Fifth Amendment to the Constitution.

CONCLUSION.

This case presents to this Honorable Court three matters of law of transcending importance:

(1) There is present herein a conflict between the decision of the Seventh Circuit United States Court of Appeals in the instant case and the decision of the Ninth Circuit United States Court of Appeals in *Hotch* v. *United States*, 212 Fed. (2) 280 (a. d. 1954). The approval of the bid of Petitioners, coupled with the charging of the account of Respondent by the Executive Agency, was the final "other instrument" which was issued by its contracting officer. These elements, in the one instrument, combine to divest the United States Government of all right to the property in question. Simultaneously, the same instrument invests the Petitioners with every right to complete its transaction with the Respondent.

The point of conflict concerns whether or not an unpublished United States Agency Regulation can bind the public under the Federal Register Act.

(2) There is also present herein a conflict between the decision of the Seventh Circuit United States Court of

Appeals in the instant case and the decision of the Ninth Circuit United States Court of Appeals in *United States* v. *Jones*, 176 Fed. (2) 278 (a. d. 1949).

The point of conflict concerns whether or not subsection (d) of Sec. 484, of subchapter II of Title 40, United States Code, affords complete protection to a bona fide transferee without notice of lack of compliance by an Executive Agency with the provisions of subchapter II.

(3) There is also present herein an important question of Federal law which has never been, but should be decided by this court.

This question is whether or not the Statute, Subsection (a) of Sec. 98e, of Chapter 5, of Title 50, United States Code, "exempts" from stockpiling, as Strategic or Critical Material, Contractor Surplus Termination Inventory which has not been taken possession of by the Government (prior to execution of an instrument purporting to transfer title or any other interest to a bona fide transferee).

For the reasons herein contained we respectfully submit that the Writ of Certiorari ought to be granted.

Respectfully submitted,

AVRUM N. ANDALMAN and
HARRY G. FINS,
Attorneys for Rose Finsky, Avrum N. Andalman, Joseph M. Andalman, Lee B. Andalman, Maxwell N. Andalman and Yetta S. Andalman, co-partners doing business as Surplex Sales,
Petitioners.

Certificate of Service.

I, Avrum N. Andalman, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 20, 1958 I served Five (5) copies of the foregoing Petition for Writ of Certiorari on Respondent's attorney of record Robert Tieken, United States Court House, South East corner of Clark and Adams Street, Chicago, Illinois, by depositing them in the United States Mail Box in Lobby of 33 N. LaSalle Street, Chicago 2, Illinois in a package addressed to him to which first class postage prepaid and which was attached thereto.

March 20, 1958.

AVRUM N. ANDALMAN
One of the attorneys for
Petitioners.

This Opinion Filed Nov. 21, 1957. Petition for Rehearing Denied Dec. 26, 1957.

APPENDIX I.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12053 SEPTEMBER TERM, 1957, SEPTEMBER SESSION, 1957.

ROSE FINSKY, et al.[1]
Plaintiffs-Appellants,
v.
UNION CARBIDE & CARBON CORP., a New York corporation, owners and operators of a division thereof known as Haynes Stellite Co.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 21, 1957

Before DUFFY, *Chief Judge*, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Plaintiffs appeal from a summary judgment in favor of defendant, entered on defendants' motion, which judgment also denied plaintiffs motion for summary judgment.

[1] Avrum Andalman, Joseph M. Andalman, Lee B. Andalman, Yetta S. Andalman and Maxwell N. Andalman, co-partners, doing business under the name of Surplex Sales.

Plaintiffs filed a complaint in what they state is an action for damages for breach of a contract of sale, involving certain tungsten powder[2] and other materials.

Defendant's answer to the complaint, as later amended,[3] set up, among affirmative defenses, that title to the tungsten was in the federal government, and any prospective sale of the said tungsten was subject to the applicable United States statutes and regulations, and that plaintiffs at no time ever acquired a valid title or claim to the said tungsten.

The case was submitted on the motions for summary judgment and the pleadings, requests for admissions, responses to requests for admissions, affidavits, depositions and exhibits in support thereof. Therefrom appear the following relevant facts:

Defendant's Haynes Stellite division[4] entered into Department of Defense contracts for production of an item for Army Ordnance. To perform these contracts, defendant bought about 972,000 lbs. of tungsten all but 173,205 lbs. of which was used in the production for Army Ordnance.

A certain provision contained in each of these contracts is, in part:

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories,

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[2] Hereinafter sometimes called "tungsten".

[3] Count I alleges a breach of contract and seeks damages, Count II asks for a declaratory judgment and specific performance, Count III prays for a declaratory judgment and damages, and Count IV asks for money had and received and seeks recovery of $1,054,745.39 allegedly paid defendant by United States (hereinafter referred as to "the government") for tungsten to which plaintiffs claim they are entitled, plus interest.

[4] Sometimes referred to herein as "Haynes Stellite".

> • • • therefore acquired or produced by the Contractor for the performance of this contract, • • • shall forthwith vest in the Government; • • •."

Another provision contained in each of these contracts provided for termination of the contract for the convenience of the government upon notice to the contractor. Also provided therein was the obligation of the contractor to use its best efforts to sell, in the manner, at the time, to the extent, and at the price or prices directed or authorized by the government contracting officer, all such material produced as a part of, or acquired in connection with the performance of the work terminated by the notice.

Specifically there were the following provisions:

> "• • • Provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the clause of this contract entitled Termination for Convenience of Government and applicable laws and regulations. • • •"

and

> "(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall • • • (6) transfer title and deliver to the Government, • • • (i) • • • material produced as a part of, or acquired in connection with the performance of the work terminated by the Notice of Termination, • • •."

Prior to March 9, 1953, the government made partial payments, under these contracts, of over $3,000,000. All of the tungsten acquired thereunder was physically segregated. The tungsten under the said government contracts was also segregated in its use and in records in regard thereto.

Prior to completion of these contracts, the government contracting officer, Henry C. Laskin, served upon defendant notice that the government, effective March 11, 1953, terminated these contracts for its convenience. Thereafter,

Laskin directed defendant to dispose of all materials acquired by defendant under these contracts, including the 173,000 pounds of tungsten, to advertise for and solicit bids for the sale thereof, and to sell, to the high bidder, with the approval of the United States government, all such materials.

Early in February 1954 defendant advertised three times in the Waste Trade Journal, soliciting bids for the 173,000-odd pounds of tungsten, among other items. This advertisement appeared under a bold face caption reading "GOVERNMENT CONTRACT CANCELLATION." The advertisement further stated, "The Government reserves the right to reject any and all bids. Terms Cash, F.O.B. Kokomo plant." Plaintiffs saw this advertisement.

February 11, 1954, Haynes Stellite wrote a letter to Surplex Sales inviting bids on all the materials listed in the advertisement. This letter in part provided, "Terms of payment will be our option. (Cashier's check, certified check, or sight draft)."

February 23, 1954, plaintiffs submitted their bid on the tungsten among other items, expressly pursuant to the advertisement and the letter. This bid, in part, stated, "Terms of payment per your letter at your option."

Haynes Stellite advised plaintiffs that Surplex Sales was high bidder on the tungsten "and that report would be made to the government and the plaintiffs would be notified orally and in writing if their bids were approved by the United States Government."

March 4, 1954, plaintiff Joseph Andalman telephoned New York Ordnance where the bid was subject to approval. He called again on March 5, 1954 and was told that plaintiffs' bid was approved. He and plaintiff Maxwell Andalman the next day went to Kokomo, Indiana, where the tungsten was stored, and met with the Haynes

Stellite office manager. Here they gave him a check for one barrel of the tungsten, and commented that they needed it for use as sales samples. At the same time the office manager handed them a letter stating that they had been awarded the tungsten in accordance with their February 23 bid. Plaintiffs later received written notification from New York Ordnance confirming acceptance. Laskin and the Army Board of Awards approved the bid without submitting or offering the tungsten to the General Services Administration, which gave no release or authorization for the sale.

March 10, 1954, New York Ordnance wired Haynes Stellite, in substance, that the sale of tungsten to Surplex Sales was "suspended," and that "no deliveries are to be made whatsoever pending further instructions." Defendant notified plaintiffs thereof the same day.

By letter dated March 17, 1954, Laskin directed defendant to turn over to the government, in accordance with forthcoming shipping instructions, the tungsten in question, giving as a reason that General Services Administration had not approved the disposition of the property to plaintiffs, that it was being stock-piled by the government and the interests of national defense required that it be delivered to the government and the aforesaid approved disposition (to plaintiffs) canceled or rescinded. The material was thereupon delivered to the government.

Defendant, which in this litigation is represented by government attorneys, argues that the parties in this case are presumed to have assented to applicable federal law existing at the time they entered into their contract, which prohibited the sale of the tungsten powder and directed it to be stockpiled as material strategic and critical to the national defense and that defendant's performance of the contract with plaintiffs was therefore excused.

To meet this argument, plaintiffs say that defendant is attempting to go behind the sale to show what the government did and did not do prior to refusing to take possession and title and ordering the property sold, defenses which (they say) actually have no place in this case and require no reply by them. Be that as it may, plaintiffs argue that these defenses are overcome by the law. They contend that a federal act (40 U.S.C.A. § 484, *et seq.*) basically underlies the sale of government surplus and contract termination inventory and that § 484 (d) thereof made the routine acceptance and approval of plaintiffs' bid, on which the written award in this case was based, conclusive evidence of compliance with the law insofar as it concerns their title as purchasers. Plaintiffs further contend that the army could have taken possession, if it saw fit to do so, when it terminated the "classified" contract with defendant. The contract gave the government that right and option, but not having exercised such right and option, the material became exempt and saleable free of governmental interest.

We shall now consider all acts of congress and all directives, orders and regulations, bearing upon the respective contentions of the parties. We shall quote only relevant parts thereof.

By 40 U.S.C.A. ch. 10, § 471 *et seq.*' Management and Disposal of Government Property,[5] provision is made, *inter alia*, for the disposal of government surplus property.

Definitions in § 472 include:

> "(a) The term 'executive agency' means any executive department or independent establishment in the executive branch of the Government, * * *."

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[5] Which we shall sometimes refer to as "Government Property act."

"(c) The term 'Administrator' means the Administrator of General Services[6] • • • ."

"(e) The term 'excess property' means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof."

"(g) The term 'surplus property' means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator."

"(k) The term 'contractor inventory' means (1) • • • and (2) any property which the Government is obligated to take over under any type of contract as a result • • • of the termination of such contract • • • prior to completion of the work, for the convenience or at the option of the Government."

Section 483 reads, in part:

"**Property utilization—(a) Policies and methods**

In order to minimize expenditures for property, the Administrator shall prescribe policies and methods to promote the maximum utilization of excess property by executive agencies, and he shall provide for the transfer of excess property among Federal agencies.

Duties of executive agencies

(b) Each executive agency shall • • • (2) continuously survey property under its control to determine which is excess property, and promptly report such property to the Administrator, (3) perform the care and handling of such excess property, and (4) transfer

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[6] The General Services Administration was established June 30, 1949 by act of Congress, 5 U.S.C.A. §630, 1956 Annual Pocket Part 127, which reads, in part:

"**General Services Administration—Establishment** (a) There is established an agency in the executive branch of the Government which shall be known as the General Services Administration.

Administrator of General Services; appointment (b) There shall be at the head of the General Services Administration an Administrator of General Services • • • ."

or dispose of such property as promptly as possible in accordance with authority delegated and regulations prescribed by the Administrator.

Transfers between departments of Department of Defense

(d) * * * excess property of one of the departments of the Department of Defense may be transferred to another department thereof.

Transfer of excess property

(e) Transfers of excess property between Federal agencies * * * shall be at the fair value thereof, as determined by, or pursuant to regulations of, the Administrator * * *."[7]

Section 484 provides:

"**Disposal of surplus property—(a) Supervision and direction**

Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. * * *

Care and handling

(b) The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

Method of disposition

(c) Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or

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[7] While the tungsten became excess property on March 11, 1953, no one contends that it was thereafter transferred between departments of the Department of Defense, or between fedral agencies as was permissible under §483 (d) and (e).

other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.

Validity of deed, bill of sale, lease, etc.

(d) A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

* * *

Contractor inventories

(f) Subject to regulations of the Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

* * *"

Section 486 reads as follows:

"**Policies, regulations, and delegations—(a) Promulgation by President**

The President may prescribe such policies and directives,[8] not inconsistent with the provisions of this chapter, chapter 11B of Title 5, chapter 4 of Title 41, and chapter 11 of Title 44, as he shall deem neces-

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[8] The President directed the Administrator of General Services to make a study and a determination of the centralization in General Services Administration to be attained in the performance of the functions involved in the June 30, 1949 Federal Property act, and he directed that thereupon "the Administrator shall prescribe such regulations as may be necessary to implement the determination resulting from such studies and surveys." The President further directed that the various executive agencies "shall, insofar as practicable, procure, utilize and dispose of property in accordance with the provisions of the Act [said chapters] and the regulations issued thereunder in order that the greatest overall efficiency and economy may be effected."

sary to effectuate the provisions of said chapters, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder.

• • •

Regulations by Administrator

(c) The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this chapter, chapter 11B of Title 5, chapter 4 of Title 41, and chapter 11 of Title 44, and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations.

• • •"

Section 487 (a) reads thus:

"**Surveys of Government property and property management practices; utilization of uniform catalog system and standardized purchase specifications; audit**

(a) • • • the Administrator is authorized (1) to make surveys of Government property and property management practices and obtain reports thereon from executive agencies; (2) to cooperate with executive agencies in the establishment of reasonable inventory levels for property stocked by them and from time to time report any excessive stocking to the Congress and to the Director of the Bureau of the Budget; • • •"

By section 492 the Administrator is required to make reports to Congress.

What is known as the "Strategic and Critical Materials Stockpiling Act", 50 U.S.C.A. 98, *et seq.*[9] contains, *inter alia*, the following provisions:

"**Declaration of policy**

The natural resources of the United States in certain strategic and critical materials being deficient or insufficiently developed to supply the industrial, mili-

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[9] Which we shall sometimes refer to as "Strategic Materials act".

tary, and naval needs of the country for common defense, it is the policy of the Congress and the purpose and intent of sections 98-98h of this title to provide for the acquisition and retention of stocks of these materials and to encourage the conservation and development of sources of these materials within the United States, and thereby decrease and prevent wherever possible a dangerous and costly dependence of the United States upon foreign nations for supplies of these materials in times of national emergency."

Section 98a, as amended July 26, 1947,[10] provides in part:

"**Strategic and critical materials; determination; quanitity and quality to be purchased; formation and functions of industry advisory committees; subsistence and traveling expenses of members**

(a) To effectuate the policy set forth in section 98 of this title the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Interior, acting jointly through the agency of the Army and Navy Munitions Board, are[11] authorized and directed to determine, from time to time, which materials are strategic and critical under the provisions of section 98-98h of this title and to determine, from time to time the quality and quantities of such materials which shall be stockpiled under the provisions of said sections. * * *",

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[10] See Ch. 343, Title II §213, 61 Stat. 505.

[11] All functions under section 98 **et seq.** of this title vested in the Secretaries of the Army, Navy, Air Force, and Interior or in any of them or in any combination of them, including the functions vested in the Army and Navy Munitions Board by section 98e (2) of this title, but excluding the functions vested in the Secretary of the Interior by section 98f of this title, were transferred to the Director of the Office of Defense Mobilization by 1953 Reorg. Plan No. 3 §2(b), eff. June 12, 1953, 18 F.R. 3375, 67 Stat. 634.

Section 98b reads, in part:

"**Purchase, storage, refinement, rotation, and disposal of materials**

The Secretary of the Army and the Secretary of the Navy[11] shall direct the Administrator of General Services to—* * * (e) dispose of any materials held pursuant to sections 98-98h of this title which are no longer needed because of any revised determination made pursuant to section 98a of this title, as hereinafter provided. * * * *Provided*, That no material constituting a part of the stock piles may be disposed of without the express approval of the Congress except where the revised determination is by reason of obsolescence of that material for use in time of war. * * *."

Section 98e reads in part as follows:

"**Transfer of surplus materials to stock piles; exceptions; * * ***

(a) Pursuant to regulations issued by the General Services Administration, every material determined to be strategic and critical pursuant to section 98a of this title, which is owned or contracted for by the United States or any agency thereof, * * * shall be transferred by the owning agency, * * * to the stock piles established pursuant to sections 98-98h of this title, * * *. There shall also be exempt from the requirement (1) any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory, * * *."

General Services Administration by Emergency Procurement Regulation No. 1, dated August 14, 1951, and Supplements No. 1 and No. 2,[12] all of which were in effect during the year 1954, provided, in part:

"1. *Purpose.* This Regulation prescribes the policy and general methods for the transfer of excess strategic and critical materials to the stock pile. It is

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[12] As a group hereinafter referred to as regulation No. 1.

issued pursuant to the provisions of the Strategic and Critical Materials Stock Piling Act (60 Stat. 596; 50 U.S.C. 98-98h), and the Federal Property and Administrative Services Act of 1949, as amended (Public Laws 152 and 754, 81st Congress),[13] and in cooperation with the Munitions Board of the Department of Defense."

"2. *Definitions.*

* * *

b. 'Contractor inventory' means (1) * ** and (2) any property which the Government is obligated or has the option to take over under any type of contract as a result * * * of the termination of such contract * * * prior to completion of the work, for the convenience or at the option of the Government.

c. 'Excess,' with respect to strategic materials, means any such property under the control of any agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

d. 'Holding agency' means any agency having accountability for strategic materials.

e. 'Strategic materials' means material determined to be strategic and critical by the Munitions Board pursuant to the Strategic and Critical Materials Stock Piling Act, a list of such materials being appended hereto as Appendix A."

"3. * * *

c. *Form of Reports.* Holding agencies shall file reports of excess strategic materials with the Administration * * *.

d. *Contractor Inventory.* Each agency having strategic materials in contractor inventory which are determined to be excess to the needs of the agency, shall report such materials in the manner prescribed by this Regulation. * * * When after reporting such property, the strategic materials are determined suitable for stock piling, the contracting

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[13] 40 U.S.C.A. 471, *et seq.*

agency shall take the necessary action to acquire title for the Government and shall transfer such property to the General Services Administration for stock piling, in accordance with Section 4 of this Regulation."

"4. *Transfers to the Stock Pile.*

a. *General.* Excess strategic materials reported to the Administration, which are determined by the Administration to be suitable for stock piling, shall be transferred to the General Services Administration for stock piling in accordance with this Regulation.

b. *Unsuitable Items.* Excess strategic materials reported to the Administration which are determined by the Administration to be unsuitable for stock piling or which cannot economically be converted to meet stock pile requirements shall, after notification of such determination, be reported and disposed of in accordance with the provisions of General Services Administration Personal Property Management Regulation No. 3, Revised."

• • •

"APPENDIX A
LIST OF STRATEGIC AND CRITICAL MATERIALS

• • •

"Tungsten	Ores, concentrates, ferro, powder metal, oxide.	10,000 pounds"

• • •

Congress has placed upon the General Services Administration a function, which has two prongs, one derived from the Government Property act and the other from the Strategic Materials act. The former serves the principal purpose of efficiency and economy;[14] the latter, the

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[14] 40 U.S.C.A. §471:

"It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for • • • (b) the utilization of available property; (c) the disposal of surplus property; • • •."

common defense.[15] Each is complete and independent of the other. The existence of this responsibility, being embedded in statutory law, all persons are bound to recognize the function of the General Services Administration when dealing in the respective areas covered by those two acts of Congress.[16] Where the approval of that admininistration is required, no error, oversight or mistake by anyone can excuse an omission to obtain it. Without its approval of the disposition of government property subject to said statutes, a red light is set preventing a consummation of any such transaction. Only by the procurement of such approval can such a transaction, if otherwise lawful, proceed on a green-light to consummation.

The Government Property Act.

The legislative history makes it clear that it was the congressional intent, in enacting the Government Property

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[15] 50 U.S.C.A. §98:

"The natural resources of the United States in certain strategic and critical materials being deficient or insufficiently developed to supply the industrial, military, and naval needs of the country for common defense, it is the policy of Congress * * * to provide for the acquisition and retention of stocks of these materials * * *."

[16] **United States v. Jones**, 176 F. 2d 278, is heavily relied upon by plaintiffs. It is significant that in that case the court, at 281, said:

"* * * a public officer, in exercising powers conferred upon him by statute and regulation, is bound to follow the mode or manner prescribed. One who deals with such official is on his notice of possible limitations of authority. And no estoppel can arise against the Government from the performance of unauthorized acts or from authority exercised in a manner forbidden." (Citing cases.)

act, to deal with the most important phase of property management, which is continuing use by the government of the government's property, and the disposal of its surplus property. See House Committee Report, U.S. Code Congressional Service (1949), 1475, 1476, 1478, 1487 and 1488.

The act places upon the Administrator a duty to determine what excess property shall constitute surplus property, § 472 (g), and a duty to provide for the transfer of excess property among federal agencies, § 483 (a). The act requires prompt reports of excess property by each executive agency to the Administrator and the transfer or disposal thereof in accordance with authority delegated and regulations prescribed by the Administrator, § 483 (b).

A general power of supervision and direction over the disposition of surplus property is vested in the Adiministractor, § 484 (a). In fact, the disposal of surplus property may be performed by the Administrator, or, when so determined by him, by the executive agencies in possession thereof or by any other executive agency consenting thereto, § 484 (b).

By § 484 (c) any executive agency designated by the Administrator may dispose of surplus property upon such terms and conditions as the Administrator deems proper.

Subject to the Administrator's regulations, any executive agency may authorize any contractor with it to retain or dispose of any contractor inventory, § 484 (f).

Section 486 (c) empowers the Administrator to prescribe regulations to effectuate his functions, and directs the head of each executive agency to issue orders to carry out such regulations. In addition, § 487 (a) authorizes the Administrator to report any excessive stocking of property to the Congress and the Director of the Bureau of the Budget.

In this court, the keystone in plaintiffs' case is § 484 (d), which reads:

> "A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in *surplus* property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance." (Emphasis supplied.)

When the army's New York Ordnance suspended the sale to plaintiffs, one barrel of tungsten had been delivered to them, for which they paid cash. They never paid or tendered any part of the purchase price on the balance of tungsten which they had agreed to buy. The circumstances under which they made their bid show that they knew they were dealing with material subject to government contract cancellation, and that the terms of their bid were cash, f.o.b. defendant's plant. They were specifically informed in Haynes Stellite's letter soliciting bids that the terms of payment would, at the option of Haynes Stellite, be cashier's check, certified check or sight draft (which is equivalent to cash). Their bid expressly accepted these terms of payment.

Burns Indiana Statutes (1951), § 58—202, (relied upon by plaintiffs) is as follows:

> "**Property in specific goods passes when parties so intend.—**
>
> (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

The circumstances above set forth indicate that the parties to the contract intended that the title to the tungsten would be transferred to plaintiffs at Kokomo, Indiana, when they paid for it. Therefore, when Laskin called the attention of defendant to the fact that General Services Administration had not approved the disposition of the property to plaintiff, which fact required that the sale to plaintiffs be canceled, the contract between defendant and plaintiffs was still unconsummated and no title had passed, except as to one barrel of tungsten. Inasmuch as there never was a time, prior to the government's intervention, when the parties to the contract intended the property in the tungsten to be transferred to plaintiffs and there never was any instrument executed purporting to transfer the title, § 484 (d) does not sustain plaintiffs' position.

It will be noted that § 484 (d) of the Government Property act, upon which plaintiffs rely, limits its application to *surplus property* under *that* act. Having thus taken the position that they are buying surplus property, plaintiffs are unable to point to any action by the Administrator directing or supervising the sale of the tungsten to them, as required by § 484 (a), nor can they show that this surplus property was disposed of by the Administrator or by an executive agency which the Administrator determined should so dispose of it, as provided in § 484 (b). Moreover, inasmuch as § 484 (f) deals with the disposal of property constituting a part of a contractor inventory, plaintiffs point to no regulation of the Administrator under which the sale herein relied upon by plaintiffs was made.

The tungsten in this case was contractor inventory. By virtue of the partial payments clause of the contracts between the government and defendant, title to it was in the government. Even if title was not in the government,

under termination clauses of the contracts the government had an option to take title, so that the tungsten was nevertheless "contractor inventory", and was subject to stock piling.

The contract was unenforcible, for want of compliance with the Government Property act. What we have said requires affirmance of the judgment of the district court.

Because the facts in *United States* v. *Jones*, 176 F.2d 278, relied upon by plaintiffs, are fundamentally different from those in the case at bar, that case, with its able opinion, is not persuasive here. Among the differences in facts are in the following:

(1) In the *Jones* case the government relied on an error made by its employees which led to the consummation of a sale of surplus property. There was no assertion of lack of authority to make the sale (p. 283 as there was here; (2) after agreeing to buy the material, Jones paid for all of it and sales memoranda were issued to him accordingly; (3) a receipt for his payment as well as bills of sale (form W.A.A.—1(a)) were mailed to Jones.

All of the items sold except a lot of universal gear joints, were delivered to Jones but the government refused to deliver the latter joints. Instead it sued to rescind the sale. The court recognized that in the *Jones* case "there were proper instruments acknowledging transfer of title to the purchaser". Of course the court held, at 289, that, in view of § 25 of the Surplus Property act of 1944, 58 Stat. 780 (which is relevantly the same as § 484 (d) of the General Property act, here relied on by plaintiffs):

"* * * *the very parties with whom the agencies dealt and to whom the instruments were made out*, should be protected if they paid value. No other condition was attached.

"Jones is in this class. He paid value, the price asked. * * *"

The Strategic Materials Act

Equally fatal to plaintiffs' action is the Strategic Materials act, 50 U.S.C.A. 98, *et seq.* Enacted to further the common defense of the country, this act provides for the acquisition and retention of stocks of strategic and critical materials in order to supply the industrial, military and naval needs of the country. It authorizes the Director of the Office of Defense Mobilization to determine what materials are strategic and critical. This act provides that, pursuant to regulations issued by the General Services Administration, material owned or contracted for by the United States or any agency thereof, when determined by such agency to be surplus, shall be transferred to stock piles, provided that any material in contractor inventory is to be exempt from stock piling if the owning agency shall not have taken possession of such inventory. § § 98a, 98b and 98e (a).

Plaintiffs argue that, because regulation No. 1 was not published and because they did not learn of it, their purchase from defendant is not subject to the act itself. It is not denied by plaintiffs that regulation No. 1 was adopted. They say that it was not published. They cite no authority requiring publication. They do not charge that knowledge of the adoption of the regulation or its contents was kept from them by any act or conduct of General Services Administration or any other governmental body or officer. This regulation, in part, listed tungsten as a strategic and critical material. This listing had the effect of applying the Strategic Materials act to the tungsten later bought by plaintiffs.

We hold that, on the facts in this case and the applicable provisions of the Strategic Materials act and regulation No. 1, the tungsten here involved was stock-piled as a strategic and critical material and therefore the sale of it to plaintiffs was and is invalid.

By reply brief plaintiffs for the first time made the contention that there is no evidence in the record that the "Munitions Board [*sic*]" ever determined that tungsten was critical and in what quantities it deemed it critical. They say, in effect, that General Services Administration's so listing it, does not make it so. This matter was not discussed in either plaintiffs' main brief or the defendant's brief herein, and, as pointed out by defendant in oral argument, the introduction of this matter belatedly in the reply brief is in violation of rule 17 (e) of this court. We do not, therefore, express any opinion as to that contention.

Conclusion as to Validity of Contract

The approval of General Services Administration is an integral part of the authority essential to the creation of the alleged contract upon which plaintiffs sued. Without that approval the contract does not exist any more than a three-legged stool can stand when it is built with one leg missing. We hold that, under federal law, the contract beween plaintiffs and defendant was unauthorized and, therefore, was and is unenforcible.

Plaintiffs urge that the facts in this case show that their property was taken for public use without due process or just compensation, relying upon amendments V and XIV of the constitution of the United States. We do not agree with this contention.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II

MEMORANDUM OF OPINION.

(Filed Feb. 11, 1957)

Plaintiffs and defendant have filed motions for summary judgment under Rule 56, agreeing there is no genuine issue as to any material fact between the parties, and each seeks summary judgment as a matter of law.

From a consideration of the pleadings, affidavits, briefs and oral arguments had in support of their respective contentions, the court has jurisdiction of the parties and subject matter, and it is proper this matter be decided as a matter of law by summary judgment.

The Tungsten powder in issue was classified material and the property of the United States under contracts of July 6, 1951 and February 13, 1952 between defendant and the Department of Defense.

Defendant, in advertising said powder for sale, was an instrumentality of the United States acting under the authority and direction of the Government Contracting Officer, who erroneously failed to screen the disposition thereof with the General Services Administration, as required by the applicable law and regulations, set forth in defendant's brief.

The burden is on the plaintiffs to substantiate the lawful acquisition of property owned by the United States. Innocent errors and illegal procedures committed by governmental employees and instrumentalities used by the United States do not inure to the benefit of others, nor may they be the basis for creating a liability against the United States or its instrumentalities or be otherwise urged as a concept for requiring the United States to complete a sale and disposition of its property in violation of the pertinent statutes and regulations. To determine otherwise would conclude that erroneous and illegal acts and procedures be substituted for the Congressional intent and the resulting statutes.

Plaintiffs' motion for summary judgment on the law overruled and denied.

Defendant's motion for summary judgment on the law allowed. Defendant to submit proposed findings of fact and conclusions of law on or before the 18th day of February, 1957.

Igoe
Judge, United States District Court.

APPENDIX A.

Sections 301 to 310 inclusive of Title 44, United States Code. (Pertinent parts, set out in full)

Chapter 8B.—FEDERAL REGISTER

§ 301. Custody and printing of Federal documents; "Division" created in Archives Establishment; Director, appointment and compensation.

The Administrator of General Services, acting through a division established by him in the National Archives Establishment, hereinafter referred to as the "Division", is charged with the custody and, together with the Public Printer, with the prompt and uniform printing and distribution of the documents required or authorized to be published under section 305 of this title.

§ 302. Filing documents with "Division"; notation of time; public inspection; transmission for printing.

The original and two duplicate originals or certified copies of any document required or authorized to be published under section 305 of this title shall be filed with the Division, which shall be open for that purpose during all hours of the working days when the Archives Building shall be open for official business. The Administrator of General Services shall cause to be noted on the original and duplicate originals or certified copies of each document the day and hour of filing thereof: *Provided*, That when the original is issued, prescribed, or promulgated outside of the

District of Columbia and certified copies are filed before the filing of the original, the notation shall be of the day and hour of filing of the certified copies. Upon such filing, at least one copy shall be immediately available for public inspection in the office of the Administrator of General Services. The original shall be retained in the archives of the National Archives Establishment and shall be available for inspection under regulations to be prescribed by the Administrator of General Services. The Division shall transmit immediately to the Government Printing Office for printing, as provided in this chapter, one duplicate original or certified copy of each document required or authorized to be published under section 305 of this title. Every Federal agency shall cause to be transmitted for filing as herein required the original and the duplicate originals or certified copies of all such documents issued, prescribed, or promulgated by the agency. (July 26, 1935, ch. 417, § 2, 49 Stat. 500; June 30, 1949, ch. 288, title I, § 104 (a), 63 Stat. 381.)

§ 303. "Federal Register"; printing; contents; distribution; price.

* * *

§ 304. Definitions.

As used in this chapter, unless the context otherwise requires, the term "document" means any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency; the terms "Federal agency" or "agency" mean the President of the United States, or any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government; and the term "person" means any individual, partnership, association, or corporation. (July 26, 1935, ch. 417, § 4, 49 Stat. 501.)

§ 305. Documents to be published in Federal Register; comments and news items excluded.

(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided*, That for the purposes of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

* * *

§ 306. Administrative Committee of the Federal Register; establishment and composition; powers and duties.

* * *

§ 307. Filing document as constructive notice; publication in Register as presumption of validity; judicial notice; citation.

No document required under section 305 (a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption

(a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been compiled with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number. (July 26, 1935, ch. 417, § 7, 49 Stat. 502.)

• • •

§ 308. Publication in Register as notice of hearing.

• • •

§ 310. Effective date of section 302; time for publication of Register.

The provisions of section 302 of this title shall become effective sixty days after July 26, 1935, and the publication of the Federal Register shall begin within three business days thereafter: *Provided*, That the appropriations involved have been increased as required by section 309 of this title.

• • •

APPENDIX B.

Section 1001 to 1011 of Title 5, United States Code.
(Pertinent parts, set out in full)

Chapter 19.—ADMINISTRATIVE PROCEDURE

§ 1001. Definitions.

As used in this chapter—

(a) Agency.

"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.

• • •

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

§ 1002. Publication of information, rules, opinions, orders and public records.

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) * * * and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

§ 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates th finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) Time of publication or service of rules.

The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

APPENDIX C

Subsection (a) to (i) inclusive of Title 40 Section 484, United States Code.

(N.B. Pertinent parts of these sections are set out in full. Emphasis subsection (a), (d) and (i) ours.)

Disposal of surplus property—(a) Supervision and direction.

Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this chapter, chapter 11B of Title 5, chapter 4 of Title 41, and chapter 11 of Title 44.

(b) Care and handling.

The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

(c) Method of disposition.

Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this subchapter.

(d) Validity of deed, bill of sale, lease, etc.

A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

(e) Advertising as prerequisite to disposal.

Unless the Administrator shall determine that disposal by advertising will in a given case better protect the public interest, surplus property disposals may be made without regard to any provision of existing law for advertising until 12 o'clock noon, eastern standard time, June 30, 1953: *Provided,* That an explanatory statement shall be prepared and submitted to the appropriate committees of Congress and a copy preserved in the file of all cases were negotiated disposal occurs.

(f) Contractor inventories.

Subject to regulations of the Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

(g) Agricultural commodities, foods, and cotton or woolen goods.

The Administrator, in formulating policies with respect to the disposal of surplus agricultural commodities, surplus foods processed from agricultural commodities, and surplus cotton or woolen goods, shall consult with the Secretary of Agricultural.

• • •

(h) Same; transfer to Department of Agricultural for price support or stablization reasons; deposit of receipts, limitation on sale of surplus farm commodities.

Whenever the Secretary of Agricultural determines such action to be required to assist him in carrying out his responsibilities with respect to price support or stablization, the Administrator shall transfer without charge to the Department of Agricultural any surplus agricultural commodities, foods, or cotton or woolen goods to be disposed of.

• • •

(i) Vessels; laws governing sales.

The United States Maritime Commission shall dispose of surplus vessels of one thousand five hundred gross tons or more which the Commission determines to be merchant vessels or capable of conversion to merchant use, and such vessels shall be disposed of only in accordance with the provisions of the Merchant Marine Act, 1936, as amended, and other laws authorizing the sale of such vessels.

APPENDIX D

Subsection (a) of Section 98e of Title 50 United States Code.

(The full text of 98e (a) is here set out. Emphasis is ours on the "Exemption phrase" 98e (a) (1) applicable to the instant case.)

§ 98e. Transfer of surplus materials to stock piles; exceptions; payments; reduction of amount of obligations of Reconstruction Finance Corporation

(a) Pursuant to regulations issued by the General Services Administration, every material determined to be strategic and critical pursuant to section 98a of this title, which is owned or contracted for by the United States or any agency thereof, including any material received from a foreign government under an agreement made pursuant to sections 411, 412, 413-419 of Title 22, or other authority, shall be transferred by the owning agency, when determined by such agency to be surplus to its needs and responsibilities, to the stock piles established pursuant to sections 98-98h of this title, so long as the amount of the stock pile for that material does not exceed the quantities determined therefor pursuant to section 98a of this title. There shall be exempt from this requirement such amount of any material as is necessary to make up any deficiency of the supply of such material for the current requirements of industry as determined by the Secretary of Commerce. There shall

also be exempt from this requirement (1) *any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory,* (2)such amount of any material as the Army and Navy Munitions Board determines (i) are held in lots so small as to make the transfer thereof economically impractical; or (ii) do not meet or cannot economically be converted to meet, stock-pile requirements determined in accordance with section 98a of this title. The total material transferred to the stock piles established by sections 98-98h of this title in accordance with this section during any fiscal year beginning more than twelve months after July 23, 1946 shall not exceed in value (as determined by the Secretary of the Treasury on the basis of the fair market value at the time of each transfer) an amount to be fixed by the appropriation Act or Acts relating to the acquisition of materials under sections 98-98h of this title.

APPENDIX E.

(Unpublished Regulation)

GENERAL SERVICES ADMINISTRATION
Washington 25, D. C.

August 14, 1951

Emergency Procurement Regulation No. 1

TO: Heads of Federal Agencies

SUBJECT: Transfer of Excess Strategic and Critical Materials to the Stock Pile

1. Purpose. This Regulation prescribes the policy and general methods for the transfer of excess strategic and critical materials to the stock pile. It is issued pursuant to the provisions of the Strategic and Critical Materials Stock Piling Act (60 Stat. 596; 50 U.S.C. 98-98h), and the Federal Property and Administrative Services Act of 1949, as amended (Public Laws 152 and 754, 81st Congress), and in cooperation with the Munitions Board of the Department of Defense.

2. Definitions.
   a. "Agency" means any agency of the United States, including any executive department or independent establishment in the executive branch of the Government (including any wholly owned Government corporation) or any establishment in the legislative or judicial branch of the Government.
   b. "Contractor inventory" means (1) any property acquired by and in the possession of a contractor or subcontractor (including Government-furnished property) under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (2) any property which the Government is obligated or has the option to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government.
   c. "Excess", with respect to strategic materials, means any such property under the control of any agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.
   d. "Holding agency" means any agency having accountability for strategic materials.
   e. "Strategic materials" means material determined to be strategic and critical by the Munitions Board pursuant to the Strategic and Critical Materials Stock Piling Act, a list of such materials being appended hereto as Appendix A.
3. Reports of Excess to the General Services Administration.

a. General Requirement of Reporting. All strategic Appendix A, when determined to be excess, shall be reported by the holding agency to the Administration for the purpose of determining disposition either by transfer to the General Services Administration for stock piling or by other transfer or disposal. Unless otherwise directed by the Administration in specific cases, holding agencies shall not be required to determine prior to such report whether such strategic materials meet Munitions Board specifications.

b. Reporting Less than Specified Quantities. Subject to paragraphs (1) and (2) of this subsection b., each holding agency having excess strategic materials at any one location in lots less than the minimum quantities specified in Appendix A shall retain such materials until the specified minimum is accumulated and thereafter shall report such materials to the Administration as provided in this Regulation.

(1) Whenever a holding agency has excess strategic materials at any one location in lots of 50 per cent or more of the minimum quantities specified in Appendix A, and such holding agency determines that there is no reasonable prospect of accumulating, within 12 months, the minimum quantities specified, it shall report such materials to the Administration for determination of suitability for the stock pile.

(2) Whenever a holding agency having excess strategic materials at any one location in lots of less than 50 per cent of the minimum quantities specified in Appendix A determines that

there is no reasonable prospect of accumulating, within 12 months, strategic materials in the amount of 50 per cent of the minimum quantities specified in Appendix A, it shall report and dispose of such excess in accordance with the provisions of general Services Administration Personal Property Management Regulation No. 3, Revised.

c. Form of Reports. Holding agencies shall file reports of excess strategic materials with the Administration on Standard Form 125, Report of Strategic and Critical Materials, and Standard Form 125a, Continuation Sheet, in accordance with the instructions set forth in Appendix B of this Regulation.

d. Contractor Inventory. Each agency having strategic materials in contractor inventory which are determined to be excess to the needs of the agency, shall report such materials in the manner prescribed by this Regulation. In the case of contractor-owned contractor inventory, compliance with the reporting requirements of this Regulation should ordinarily occur prior to exercising the applicable option to take over such property. When after reporting such property, the strategic materials are determined suitable for stock piling, the contracting agency shall take the necessary action to acquire title for the Government and shall transfer such property to the General Services Administration for stock piling, in accordance with Section 4 of this Regulation.

4. Transfers to the Stock Pile.

a. General. Excess strategic materials reported to the Administration, which are determined by the Administration to be suitable for stock piling,

shall be transferred to the General Services Administration for stock piling in accordance with this Regulation.

b. Unsuitable Items. Excess strategic materials reported to the Administration which are determined by the Administration to be unsuitable for stock piling or which cannot economically be converted to meet stock pile requirements shall, after notification of such determination, be reported and disposed of in accordance with the provisions of General Services Administration Personal Property Management Regulation No. 3, Revised.

c. Withdrawals. Subject to the approval of the Administration, holding agencies may withdraw, for their own use, excess strategic materials reported by them to the Administration, provided that, prior to the withdrawal request, such excess strategic materials have not been incorporated in the stock pile, as determined by the Administration.

d. Reimbursement. Transfers of excess strategic materials to the General Services Administration for stock piling shall be made without reimbursement or transfer of funds, except as provided herein. All expenses of preparation for shipment, all shipping and conversion expenses and all expenses after the date of shipment (including transportation, maintenance and storage) which are incident to the transfer of excess strategic materials to the General Services Administration for stock piling may be paid from funds appropriated pursuant to the Strategic and Critical Materials Stock Piling Act unless the holding agency elects to bear such expenses.

5. Regulations and Orders of Other Agencies. In taking

action pursuant to this Regulation, consideration must be given to applicable regulations and orders of other Government agencies, such as the National Production Authority.

6. Exceptions and Deviations. Exceptions from any portion of this Regulation and deviations from any mandatory forms prescribed hereby shall be permitted only by direction of the Administrator.
7. Rescission of Regulations. War Assets Administration Regulation No. 17, dated April 26, 1949, and all orders issued thereunder, are hereby rescinded and reference to such Regulation No. 17 in other regulations or instructions, where applicable, shall be deemed to be references to this Regulation.
8. Effective Date. This Regulation shall become effective September 14, 1951.

Russell Forbes
Russell Forbes
Acting Administrator

APPENDIX F.

Amendment V of the Constitution of the United States (excerpt):

"No person shall be • • • deprived of • • • property without due process of law; nor shall private property be taken for public use, without just compensation."

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MAY 5 1958
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957

No. 871

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, LEE B. ANDALMAN, YETTA S. ANDALMAN and MAXWELL N. ANDALMAN, Co-Partners doing business under the name of SURPLEX SALES,

Petitioners,

vs.

UNION CARBIDE & CARBON CORPORATION, a New York Corporation, Owners and Operators of Division Thereof Known as HAYNES STELLITE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Reply Brief for Petitioners

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Respondent.

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Reply Brief for Petitioners

May It Please The Court:

It is regrettable that the Brief In Opposition filed by the Respondent contains misstatements of facts and issues herein involved. Because of this, it is necessary for the Petitioners to file this Reply Brief.

I.

The Petitioners, in particular, and the public in general, cannot be bound by a Federal agency regulation which was not published in the Federal register. Such publication is required by Title 44 of the United States Code Sections 301-310.

In 1954 the Ninth Circuit so held and said that such an unpublished regulation is not binding *and is ineffective. Hotch* v. *United States*, 212 Fed. (2nd) 380.

In 1957 the Seventh Circuit, in the case at bar, has held to the contrary (*Finsky et al.* v. *Union Carbide & Carbon Corporation*, 249 Fed. (2) 449). This directly conflicts with the decision of the Ninth Circuit in the *Hotch* case *supra*.

At page 12 of its Brief, Respondent states that "the unpublished regulation involved relates only to the internal management of the Government Agencies and, in any event, *was not adopted for the guidance of the public*, * * *". (Emphasis ours.)

If this is so, it necessarily follows that this unpublished regulation could not be binding upon the public, nor upon the Petitioners as members of the public, as the unpublished regulation was intended only for interdepartmental guidance.

Accordingly, it cannot nor was it intended to, in any way, affect the rights of outsiders dealing, as members of the public, with Government Agencies. The case of *Foreman & Clark* v. *N.L.R.B.*, 215 Fed. (2nd) 396 at 410, cited by Respondent, has no bearing on this case, nor does it in any way negate the applicability of Section 2a of the Federal Administrative Procedure Act to which we referred at page 11 of our Petition and quoted: "Every agency shall separately state and currently publish in the Federal Register * * * substantive rules adopted as authorized by law * * * ".

We further call the Court's attention to the very end of said Section 2a which states: *"No person shall in any manner be required to resort to organization or procedure not so published"* (Pet. App. 27a). The problem involved in the *Foreman Clark* case was one of authorization by the department to itself to perform an act. THE PROBLEM INVOLVED IN THE INSTANT CASE IS ONE OF NOTICE TO THE PUBLIC AND TO THE PETITIONERS.

Therefore, since this unpublished regulation cannot be applied to petitioners, the material here involved, insofar as petitioners are concerned, was not and is not subject to stockpiling.

V.

Any instrument, issued by an executive agency of the United States which purports "to transfer title or any other interest" in Government "surplus property" to a "bona fide" "transferee for value, and without notice of lack of compliance", constitutes "conclusive evidence of compliance with the provisions of" Section 484(d) of Title 40 United States Code.

In 1949, the Ninth Circuit held that such transferee's rights were invulnerable to attack. (*United States* v. *Jones*, 176 Fed. (2nd) 278.)

In 1957, the Seventh Circuit, in the case at bar, held that such transferee's rights are vulnerable to attack (*Finsky et al.* v. *Union Carbide & Carbon Corp.*, 249 Fed. (2nd) 449). This is in direct conflict with the Ninth Circuit decision in the *Jones* case.

Respondent's Brief (p. 8) asserts that subsection (d) of Sec. 484 Title 40 United States Code is inapplicable to the facts in this case. It cites three reasons which we here set forth and answer categorically, as follows:

(1) "There is no instrument purporting to transfer title". (Brief in Opposition p. 8).

We answer: There are a number of instruments in the record purporting to transfer title.

We call attention to two of these:

(a) Petitioner's Ex. 21 (Rec. 206, 207). This letter from an Executive Agency (Dept. of the Army) advises Respondent's division that Petitioner's bid has been accepted and the amount of bid, $226,570.70 will be deducted from final settlement between the Government and Respondent.

Items referred to in said exhibit are identified by Ex. 20, 20-A and 20-B (Rec. 204, 206) and include the tungsten powder in question.

(b) Petitioner's Ex. 22 (Rec. 207). This letter of award from Respondent's division to Petitioners covers the material in question.

The Executive Agency having notified Respondent that the bid was accepted, its act in issuing the letter of award must be held to be the act of the Executive Agency.

This transferred title to Petitioner, subject to payment. The payment was prevented by the act of the agency (Rec. 209) *which caused Respondent to violate its agreement with Petitioners.*

Therefore the record shows "other instruments executed by or on behalf of" an executive agency which not only purports to, but does, transfer title in the property in question.

(2) "Petitioners had not paid value". (Opposition Brief, p. 8).

We answer: Petitioners were prevented by the unlawful act of the Government (Rec. 209) from making full payments. Petitioners never asked for credit. After delivery of the letter of award March 5, 1954 (Rec. 207) part of the merchandise was turned over to Petitioners and paid for

(Rec. 170) and the time—*not the terms*—of payment was arranged for (Rec. 162, 179). After the Government interfered, Respondent would not have delivered the merchandise "until matters were straightened out with the Government" (Rec. 180).

Under the circumstances Respondent cannot complain that all of the merchandise was not paid for.

(3) "The tungsten powder has never been declared surplus property within the meaning of 40 U. S. C. 472 (d)." (Opp. Brf. p. 8).

We answer: The Department of the Army's notification of "cancellation of contract for the convenience of the Government" served by it upon the Respondent March 11, 1953, stopped Respondent's work (Ex. 2, Rec. 194-195). The Department's letter to Respondent (Ex. 8, Rec. 195) referred to the merchandise here in question and said, "It has been determined that the above item be disposed of as salvage by sale * * * ". It directed Respondent to obtain bids (Rec. 196).

There is no difference between "surplus" and the term "salvage".

This letter establishes also that the Executive Agency (Department of the Army) definitely intended the merchandise in question to be considered contract termination inventory which it did not take possession of and, on the contrary, ordered the contractor to sell.

It follows that the property involved is surplus or contract termination inventory not taken possession of by the Executive Agency.

Attention is called to the fact that Respondent's advertisements are a representation to the world that they had the proper authority to sell the materials involved (Rec. 17). Its letter to Petitioners on February 11, 1954 (Rec. 15, 16) soliciting Petitioner's bid makes no reference whatsoever to the United States Government.

Respondent's official in charge, Glen H. Shelton, testified on deposition as follows, (Rec. 175):

> "When I gave Maxwell Andalman [one of Petitioners] Plff's. Ex. No. 22 on March 6, 1954 [Rec. 207, written award] I did not know of any Government regulation that has been violated. No one connected with New York Ordnance District told me at that time that Government regulation had been violated. Nor did I make inquiry. I was under the impression that all pertinent regulations had been followed so that at the time I gave him Ex. No. 22, I believed that our company had followed all required regulations. I believed that we had been acting at all times under valid instructions under the Contracting Officer. I did not know that any regulation might have been violated by anyone. I had no inkling. In advertising the tungsten powder I was under the impression that we were proceeding right." (Matter in brackets ours.)

United States v. *Jones*, 176 Fed. (2nd) 278, fully supports the position that it was Congress' intention in creating the Surplus Property Act to provide for final disposition thereof to the public rather than impose upon bidders the impossible task of investigating each agency to insure that Governmental requirements had been complied with by its officials. As there stated "If * * * in the absence of fraud or venality * * * the government could question the transaction, *the aims of the Statute would* be thwarted." (Emphasis ours.)

III.

Strategic or critical material in government termination inventory (of which the United States has not taken possession) is exempt from stockpiling under Title 50 United States Code Section 98e(a).

The record shows that the United States Government did not take possession of the property here involved prior to

March 6, 1954, the date when Petitioners received their written award (Rec. 12, 35, 167 ff).

The Respondent's official, Royal Williams, testified by deposition as follows (Rec. 156):

> "To the best of my recollection no Government Agency or officer, prior to February 23, 1954, requested possession of any of the involved tungsten. New York Ordnance did not request possession between February 23, 1954 and March 9, 1954. No other agency, officer or department of the United States between those dates ever requested possession."

Mr. Williams' superior, who is Respondent's official, Glen H. Shelton, testified by deposition as follows (Rec. 175-176):

> "I was present during the questioning of Mr. Williams and Mr. Dalton [illegible] heard questions put to them. In general, my answers would be similar".

The above testimony of the two Respondent's officials stands uncontroverted. It is, therefore, clear that the Government did not take possession of the property here involved.

If there is here involved a disputed question of fact on this point, then the District Court had no authority to enter a SUMMARY JUDGMENT, *on Respondent's Motion, as was done in the case at bar.*

It is the law that Strategic or Critical Material in Government Contractor Termination Inventory which has not been taken possession of by the Government is exempt from stockpiling under Title 50 United States Code, Section 98e Subsection(a).

The statement which appears at page 15 of Respondent's Brief that the General Services Administration "is not precluded from stockpiling such [exempted] materials where the interests of National Defense are paramount" finds no basis in the Statute or in fact.

The Executive Agency (Dept. of Army) under its contract elected to serve upon Respondent March 11, 1953 Ex. 2 (Rec. 194) which is "a notice of contract termination". Not a single word is contained therein by which the Department of the Army required possession or title.

Again, this same agency wrote to Respondent February 1, 1954 (See Ex. A, Rec. 195-197) referring to the 173,205 pounds of tungsten in question here ordering Respondent to solicit bids for the property.

Again, the Department wrote Respondent February 13, 1954 (Ex. 9, Rec. 197-198) advising sale should be on a cash basis "any credit extended to the successful bidder will be at your own risk".

On February 24, 1954 the Department received from the Respondent (Ex. 20) a letter submitting for the Department's consideration all bids received by the Respondent (See Ex. 20A, Rec. 205; Ex. 20B, Rec. 206) showing Petitioner's high bids.

On March 5, 1954, the Department wrote to Respondent (Ex. 21, Rec. 206-207) accepting Petitioner's bid and charging Respondent's account with $226,570.70.

The conclusion, from these documents, is inescapable that there was no intention on the part of the Department of the Army (until after the sale to the Petitioners was made) to retain or possess this contractor inventory.

The Act of Congress, which as a matter of substantive law, creates an exemption, must be applied with full force and effect and that language contained in Sec. 98e Subsec. (a) of Titles 50 United States Code is "*There shall also be exempt from the requirement (1) any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory* • • • ". (Emphasis ours.)

The owning agency did not take possession; the merchandise was sold to the Petitioners and they were entitled thereto.

The material in question, under the Statute, was and is exempt.

CONCLUSION.

We respectfully submit that the Petitioners have not brought this action against the United States Government. This is an action against a private corporation for breach of contract, wherein the Petitioners seek to recover money damages from a private corporation.

The cause here involved presents important questions of Federal Law on which there is conflict between various Circuits of the United States Courts of Appeal.

For the reasons set forth in the Petition for Certiorari and in this Reply Brief, we urge that the Writ of Certiorari be granted.

Respectfully submitted,

AVRUM N. ANDALMAN and
HARRY G. FINS,
Attorneys for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, ET AL., PETITIONERS

v.

UNION CARBIDE & CARBON CORPORATION, A NEW YORK CORPORATION, OWNERS AND OPERATORS OF DIVISION THEREOF KNOWN AS HAYNES STELLITE CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (Pet. App. 22a–23a) is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a–21a) is reported at 249 F. 2d 449.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1957. A petition for rehearing, timely filed, was denied on December 26, 1957. The

petition for a writ of certiorari was filed on March 22, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether title to tungsten powder passed to petitioners by virtue of Section 203 (d) of the Federal Property and Administrative Services Act where there was no instrument purporting to pass title, no payment, and no declaration by the General Services Administration that the property contracted for is surplus.

2. Whether, in the circumstances of this case, the fact that a General Services Administration regulation directed to all agency heads and relating to the procedures to be followed by the agencies in handling strategic materials was not published in the Federal Register enables petitioners to establish authority for the sale of the tungsten powder despite non-compliance by the government contracting officer with the regulation.

3. Whether contractor inventory is exempt from stock piling under the Strategic and Critical Materials Stock Piling Act.

STATUTES INVOLVED

The pertinent provisions of Federal Property and Administrative Services Act of 1949, 63 Stat. 378, as amended, 40 U. S. C. 471, *et seq.;* the Strategic and Critical Materials Stock Piling Act, 53 Stat. 811, as amended, 50 U. S. C. 98, *et seq.;* the Federal Register Act, 49 Stat. 500, as amended, 44 U. S. C. 301, *et seq.;*

and the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U. S. C. 1001, *et seq.*, appear in the appendix to the petition at pages 23a–32a.

STATEMENT

Petitioners brought this breach of contract action against respondent for its failure to deliver 173,205 pounds of tungsten powder (R. 10–17). The facts, as found by district court, are not in dispute and may be stated as follows: Respondent's Haynes Stellite division entered into contracts with the Department of Defense for production of an item for Army Ordnance (R. 142). To perform these contracts, respondent purchased approximately 972,000 pounds of tungsten powder, all but 173,205 pounds of which was used in production under these contracts (R. 106–107, 142). All of this tungsten powder was physically segregated from other tungsten powder and materials used by Haynes Stellite for other production and other contracts and separate records as to the use of this tungsten powder were maintained (R. 143). The contracts provided that title in materials acquired for the performance of the contracts vested in the government upon the making of partial payment under the contracts (R. 142, 191). Prior to March 11, 1953, when these contracts were terminated for the convenience of the government in accordance with the provisions of the contracts, the government had made partial payments under the contracts of more than $3,000,000 (R. 143).

Prior to completion of work under these contracts with the government, the principal government con-

tracting officer notified respondent that, effective March 11, 1953, the government terminated these contracts for its convenience. Thereafter, he directed respondent to dispose of all materials acquired by it under these contracts, including the 173,000 pounds of tungsten powder in issue, to advertise for and solicit bids for the sale of these materials and to sell to the high bidder, with the approval of the United States, all such materials. (R. 143-144.) In offering these materials for sale in accordance with these instructions, respondent acted as agent for the United States (R. 150).*

Early in February 1954, respondent advertised in the Waste Trade Journal, soliciting bids for the 173,000 odd pounds of tungsten powder, among other items. This advertisement was clearly captioned "Government Contract Cancellation." The advertisement also stated, "The Government reserves the right to reject any and all bids. Terms Cash, F. O. B. Kokomo plant." On February 11, 1954, respondent wrote a letter to Surplex Sales (under which name petitioners did business) inviting bids on the materials listed in the advertisement. The letter stated that "Terms of payment will be our option. (Cashiers check, certified check, or sight draft)." On February 23, 1954, petitioners submitted their bid on the tungsten powder in question, stating it was pursuant to the advertisement and the letter of solicitation. (R. 144.)

On February 23, 1954, respondent notified petitioners that Surplex Sales was the high bidder on the

*The government represents respondent in these proceedings pursuant to its cost-plus contract with respondent.

tungsten powder, that a report would be made to the government, and that petitioners would be notified if their bids were approved by the United States. Joseph Andalman, one of the petitioners, telephoned the New York Ordnance District, Department of the Army, on March 5, 1954, and was told that the Army Board of Awards had approved the high bid of Surplex Sales. The following day, two of the petitioners went to Kokomo, Indiana, where the tungsten powder was stored and met with the Haynes Stellite office manager. Pursuant to petitioners' statements that they needed some tungsten powder as a sample, respondent's office manager permitted them to take one barrel of the tungsten powder, weighing about 438 pounds, for which they gave their check for $701.68. At the same time, the office manager typed a letter stating that Surplex Sales had been awarded the tungsten in accordance with their bid of February 23, 1954, and delivered it to the petitioners. Petitioners later received a written notification from New York Ordnance, dated March 5, 1954, confirming the acceptance of the bid. In approving this bid, the government contracting officer and the Army Board of Awards had acted without submitting or offering the tungsten to the General Services Administration, which at no time gave a release or authorization for the sale. (R. 144–146.)

On March 10, 1954, New York Ordnance wired respondent that the sale of the tungsten powder to Surplex Sales was suspended and that no deliveries were to be made pending further instructions (R. 146). Respondent notified petitioners of this action

the same day (R. 146). On March 17, 1954, the New York Ordnance District instructed respondent to turn over to the government the tungsten powder in question, stating that sale of the tungsten had not been approved by the General Services Administration and that the material was to be stock-piled in the interests of national defense (R. 147, 211–212).

On cross-motions for summary judgment, the district court dismissed the action, holding that the tungsten powder was a critical material subject to stock-piling by the United States and that there was no authority for the sale of this government-owned tungsten powder (Pet. App. 22a–23a). The Court of Appeals for the Seventh Circuit affirmed. It held that the contract of sale was invalid under both the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, as amended, 40 U. S. C. 471, *et seq.*, and the Strategic and Critical Materials Stock Piling Act, 53 Stat. 811, as amended, 50 U. S. C. 98, *et seq.*; that at the time the contract was cancelled no title had passed, except as to the one barrel of tungsten for which payment had been made; that the tungsten powder was contractor inventory subject to stock-piling; and that petitioners could not avoid the consequences of the governmental determination that tungsten powder was strategic and critical because this fact had not been published in the Federal Register. (Pet. App. 14a–21a.)

ARGUMENT

The court below held that, in the absence of approval from the General Services Administration, the

contract upon which petitioners sue is unenforceable since authority to contract was lacking under both the Federal Property and Administrative Services Act and the Strategic and Critical Materials Stock Piling Act. Apparently recognizing that there was no compliance with the procedural requirements of either act so that there was no actual authority for the contract, petitioners contend, first that under section 203 (d) of the Federal Property Act, 40 U. S. C. 484 (d), the routine acceptance and approval of their bid is conclusive evidence of compliance with the requirements of the Federal Property Act and, second, that the Strategic Materials Act is not applicable because the classification of tungsten powder as strategic and critical material had not been published in the Federal Register and also because the tungsten powder was not contractor inventory in the possession of the United States Army. The courts below correctly rejected these contentions. Moreover, the conflicts asserted by petitioners do not exist.

1. Petitioners do not dispute that the statutory and regulatory requisites for the sale of government-owned property were not complied with here. Nor do they challenge the rule that the United States cannot be obligated by the acts of its officers who are without authority to perform the act relied upon. See, *e. g.*, *Federal Crop Insurance Corporation* v. *Merrill*, 332 U. S. 380; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Whiteside* v. *United States*, 93 U. S. 247. Petitioners' contention that the failure of the

contracting officer to comply with the procedures of the Federal Property Act cannot be asserted against them rests solely on Section 203 (d) of that Act, 40 U. S. C. 484 (d), which provides:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in *surplus* property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee *for value* and without notice of lack of such compliance. [Emphasis added.]

As the court below correctly held (Pet. App. 17a–18a), this provision is not applicable to the particular facts of this case since (1) there is no instrument purporting to transfer title, (2) petitioners had not paid value (except for the one barrel sample not here in dispute), and (3) the tungsten powder had never been declared surplus property within the meaning of 40 U. S. C. 472 (g) which defines surplus as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator." Petitioners cannot, and do not even attempt, to show that the tungsten powder in question was ever declared surplus by the General Services Administration as required by the Act. Thus, for three independent reasons Section 203 (d) is inapplicable here.

The alleged conflict with *United States* v. *Jones*, 176 F. 2d 278 (C. A. 9) is plainly illusory. That case involved the sale of certain universal gear joints which

had been declared surplus property to the War Assets Administration by the United States Maritime Commission. Jones had paid the agreed price, and sales memoranda, as well as bills of sale, had been issued to him prior to the time that these government agencies refused delivery. Lack of authority to consummate the sale was not claimed; instead, it was contended by the government that there was a unilateral mistake in that Jones knew the true value of the universal joints which was unknown to the government agents with whom he dealt. On the government's suit to rescind, the court held that the government could not prevail in view of section 25 of the Surplus Property Act of 1944, 58 Stat. 780, which is essentially the same as section 203 (d) of the Federal Property Act. Since the facts demonstrate that in the *Jones* case there were instruments purporting to pass title, that there was payment, and that the property sold had been declared surplus—the very factors absent here—we are unable to perceive any conflict with the present case.

2. An independent basis for the decision of the court below (Pet. App. 20a–21a) was that the contract of sale was also without legal authority because of the provisions of the Strategic and Critical Materials Stock Piling Act, 53 Stat. 811, as amended, 50 U. S. C. 98, *et seq.* This Act, which provides for the acquisition and retention of stocks of strategic materials needed for the national defense, authorizes the Director of the Office of Defense Mobilization to determine what materials are strategic and critical. 50 U. S. C. 98, 98a. Pursuant to regulations issued by the General Services Administrator, such strategic material

owned or contracted for by the United States, when determined to be surplus by the owning agency, is generally to be transferred to government stock piles, 50 U. S. C. 98e (Pet. App. 31a). The applicable regulations of the Department of Defense, section 407.606–1 of the Joint Regulations of the Armed Forces, 17 Fed. Reg. 1791, required usable property included in contractor inventory to be screened within the Department of Defense and provided further:

> (d) Items excess to the Department of Defense will be submitted as required by regulations of General Services Administration to the General Services Administration for further screening; * * *.

Section 407.606–2 provided in pertinent part:

> * * * property which must be referred by the Department of Defense Screening Agency to the General Administration, under applicable regulations of said Administration, may not be disposed of until its release in writing, or appropriate instructions for its distribution within the Government, have been received from General Services Administration.

And section 597.603–3 of the Regulations of the Department of the Army which appeared at 19 Fed. Reg. 402, on January 22, 1954, provided in pertinent part:

> * * * All reportable Contractor inventory * * * shall be screened concurrently with the Department of Defense screening agency and with General Services Administration.

In cooperation with the Munitions Board of the Department of Defense, the General Services Ad-

ministration also promulgated its Emergency Procurement Regulation No. 1, effective September 14, 1951 (Pet. App. 32a–37a). This regulation, which is directed to the heads of federal agencies, has not been published in the Federal Register. Section 3 thereof deals with agency reports of excess strategic materials to the General Services Administration, while Section 4 relates to the actions that the Administration may take in respect to materials so reported. In addition, Appendix A of this regulation enumerates the materials found to be strategic by the Munitions Board. It is undisputed that tungsten powder is listed in this appendix.

Petitioners contend that because this Emergency Procurement Regulation No. 1 was not published in the Federal Register respondent is estopped to urge that tungsten powder was a strategic material as well as that its sale was without authority. This argument fails, we submit, for two reasons. First, as held by the court below (Pet. App. 20a), neither the Federal Register Act nor the Administrative Procedure Act require publication of such a regulation. Section 5 of the Federal Register Act requires the publication of "such documents or classes of documents as may be required so to be published by Act of the Congress". 49 Stat. 501, as amended, 44 U. S. C. 305 (Pet. App. 25a). Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002, provides in pertinent part:

> Except to the extent that there is involved * * * (2) any matter relating solely to the internal management of an agency—

> (a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register * * * (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public * * *. No person shall in any manner be required to resort to organization or procedure not so published.

These are the only statutory provisions which petitioners point to as requiring publication. Since the unpublished regulation involved relates only to the internal management of government agencies and, in any event, was not adopted for the guidance of the public, there was no need for publication. See *Brownell* v. *Schering Corporation,* 129 F. Supp. 879, 905 (D. N. J.), affirmed, 228 F. 2d 624 (C. A. 3), certiorari denied, 351 U. S. 954.

Even if publication of this regulation were required, the absence of publication would not change the finding that there was no authority for the sale of the tungsten powder in question. As has been stated by the Ninth Circuit, the "clear purpose of Section 3 (a) [of the Administrative Procedure Act] is to provide a *shield* for a petitioner before the Board, or other agency, to protect him from being penalized for failing to resort to unpublished methods of procedure. It is not a *sword* by which a petition can strike down the agency's order, on the ground that the agency has not authorized itself to issue that type of order, by publishing a statement in the Federal Register!" *Foreman and Clark, Inc.* v. *National*

Labor Relations Board, 215 F. 2d 396, 410, certiorari denied, 348 U. S. 887. This emphasis on the purely defensive nature of Section 3 (a) is also supported by the legislative history of the provision. See Sen. Rept. No. 752, 79th Cong., 1st Sess., p. 12; *Legislative History of the Administrative Procedure Act,* Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 356; Attorney General's Manual on the Administrative Procedure Act, pp. 20–22 (1947).

The foregoing discussion makes it apparent that there is no conflict with *Hotch* v. *United States,* 212 F. 2d 280 (C. A. 9). In that case, Hotch was convicted of fishing in violation of a regulation of the Department of the Interior closing some Alaskan waters to commercial fishermen for certain hours. The regulation had not been published in the Federal Register. Holding the unpublished regulation ineffective against Hotch, the court stressed the fact that a person may not be criminally prosecuted for violation of law which has not been duly enacted. But as the same court pointed out in the *Foreman* case, *supra,* the fact that the failure to publish a regulation may be used as a shield as in *Hotch,* would not permit the lack of publication to confer a positive benefit such as petitioners seek here.

3. There is also no merit to the contention that the tungsten powder in question was exempt from stock piling because it was contractor inventory of which the owning agency had not taken possession. Neither the language of the Strategic and Critical Materials Stock Piling Act nor the intent of Congress permits

such a result. Section 6 of the Strategic Materials Act, 53 Stat. 812, as amended, 50 U. S. C. 98e, provides in pertinent part:

> (a) Pursuant to regulations issued by the General Services Administration, every material determined to be strategic and critical pursuant to section 98a of this title, which is owned or contracted for by the United States or any agency thereof, including any material received from a foreign government * * * shall be transferred by the owning agency, when determined by such agency to be surplus to its needs and responsibilities, to the stock piles * * *. There shall be exempt from this requirement such amount of any material as is necessary to make up any deficiency of the supply of such material for the current requirements of industry as determined by the Secretary of Commerce. There shall also be exempt from this requirement (1) any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory, (2) such amount of any material as the Munitions Board determines (i) are held in lots so small as to make the transfer thereof economically impractical; or (ii) do not meet or cannot economically be converted to meet, stock pile requirements determined in accordance with section 98a of this title. * * *

The first sentence of this section makes it mandatory that all strategic materials which are surplus to an agency's need be transferred to the stock piles. The exemptions which follow evidently serve the purpose of permitting the Act to be administered so that the

interests of industry as well as economic practicability may be considered in determining when a strategic material should be stock-piled. But while an element of discretion is thus provided by these "exemptions," the General Services Administration is not precluded from stock-piling such materials where the interests of national defense are paramount.

Petitioners' interpretation of Section 6 of the Strategic Materials Act would preclude the stock-piling of any contractor inventory since by definition "contractor inventory" is not in the possession of the government.[1] Not only is this inconsistent with the language and purpose of the statute but it does not comport with the Congressional interpretation of the Act. When the definition of "contractor inventory" was amended in 1952, 66 Stat. 593, so as to include any property which the Government "has the option" to take over, the House Report explaining this amendment said:

> * * * [The amendment] would also make the "option" property more clearly subject to regulation by the Administrator whereby it can be brought within the Federal utilization program. For example, strategic and critical materials available to the Government under the contract provision can be forbidden to be re-

[1] See definition in GSA's Emergency Procurement Regulation No. 1, Section 2 (b) (Pet. App. 33a) which adopts 40 U. S. C. 472 (k). The contractor inventory exemption from stock piling first appeared in Section 22 of the Surplus Property Act of 1944, 58 Stat. 776. The definition of contractor inventory in Section 3 (f) that Act, 58 Stat. 767, did not differ in any respect material to this case.

> tained by the contractor so that these materials may be acquired by the Government and used in its defense supply procurement program [H. R. Rep. No. 1524, 82d Cong., 2d Sess., p. 8 (1952)].

These considerations are sufficient to refute the contention that Congress, in effect, intended to exempt all strategic materials in contractor inventory from stock-piling for national defense.

CONCLUSION

For these reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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